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MASSIMO MECCARELLI

READING

THE CRISIS

Legal,
Philosophical
and Literary
Perspectives

READING THE CRISIS

The Figuerola Institute
Programme: Legal History

The Programme "Legal History" of the Figuerola Institute of Social Science History –a part of the Carlos III University of Madrid– is devoted to improve the overall knowledge on the history of law from different points of view –academically, culturally, socially, and institutionally– covering both ancient and modern eras. A number of experts from several countries have participated in the Programme, bringing in their specialized knowledge and dedication to the subject of their expertise.

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READING THE CRISIS:
LEGAL, PHILOSOPHICAL AND LITERARY PERSPECTIVES

edited by Massimo Meccarelli

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INTRODUCTION

Massimo Meccarelli

Almost a decade has passed since the outbreak of the economic crisis; from its original nucleus, its effects have quickly affected the social and geopolitical fields. Such wide impact and its complex implications make the crisis an object susceptible of multiple readings.

The basic issue examined by the studies collected in this book¹ is the outcome of the crisis for fundamental rights and social protection²; however the particular aim of these essays is to explore the impact of the crisis on law and society. We speak of 'exploration', since our analysis does not claim to carry out a comprehensive survey; rather, we want to test the depth of the problem, by comparing the analytical perspectives obtainable from legal and human sciences. The theme has a complexity that goes beyond the understanding of each specialist knowledge, and this complexity can better be tackled through a genuine multidisciplinary approach. We do not intend to propose awkward pairings between fields of knowledge that are so different in terms of language and rhetoric used and in identification and analysis of the problems; we are dealing with systems of knowledge that are relatively incommensurable. We are only interested in creating the conditions for a meaningful dialogue.

The book considers diverse topics, and there are several ways to bring together such different analyses. We give readers the freedom to set their own narrative itinerary; in these short introductory pages we want only to draw attention to the three convergence paths, which give structure to the volume.

The first part of the volume, *the crisis as a social object*, is the one in which

1 This volume began to take shape in a Workshop organized on 10th and 11th December 2015 at the University of Macerata, as part of the research project *IPC - Perceptions of (In)security and Forms of Legal Protection in Times of Crises*.

We would like to thank Prof. Manuel Martinez Neira for including this publication in the series *Legal History* of the *Figuerola Institute - Universidad Carlos III de Madrid*. Many thanks also to Francesca Martello for the editing of the manuscript.

2 It is the same basic issue investigated in the previous volume produced within the research project *IPC*: Meccarelli Massimo (a cura di) (2016), *Diversità e discorso giuridico. Temi per un dialogo interdisciplinare su diritti e giustizia in tempo di transizione*, Madrid, Universidad Carlos III de Madrid, (e-book version available open access: <https://e-archivo.uc3m.es/handle/10016/23792>).

the crisis is most directly observed in terms of its attributing force. The time of crisis is, in fact, a conjuncture, but it has *adscriptive* importance in relation to the problem we want to understand. In other words, it represents, not only an historical phase in which we can consider legal and social issues, but also the temporal circumstances that determine and configure these issues.

The essays in this section, therefore, seek to identify some attributive effects of the crisis. Silvana Colella, reading fictions of finance in contemporary British novels, observes the representations of the economic crisis through the «prism of literature» to consider what kind of «cultural work» this fiction performs. Francesco Costamagna analyses the legal aspects of the European response to the crisis, to evaluate the «impact on the fabric of the European integration process» and especially on some of its grounding elements such as the «protection of fundamental rights», the «integration through law model» and the function of the Supreme Court of Justice, which, in such a system, is called upon to set the limit of the intangibility of rights against the range of options of the political decision. Eliana Augusti inquires about the crisis of the conceptual path of «loyalty and belonging» at the basis of the configurations of legal and political orders; in particular, Augusti describes the trajectory of the dyad State-Nation, which, for a large part of the contemporary Age, has, amidst a complex dialectical tangle, undoubtedly played a major role in giving foundation to social cohesion in the legal discourse. Carla Canullo's essay closes the section, philosophically assuming the «viewpoint of the crisis as such»; Canullo considers and describes the crisis as a *social object*, «thing and perception» at the same time, consisting of an objective and subjective dimension, that makes it - and this confirms the adscriptive nature of the crisis - part of the process of «building a *new* social reality».

In the second part of the book the essays converge on a particular issue: *The problem of democracy*, which is becoming an increasingly central question now, as the changes imposed by the crisis have begun to settle down. It is the problem of recovering and renewing the democratic processes underlying civil coexistence in the context of Europe, which has built its model of legal protection and legal order on such dynamics. Again, the multidisciplinary prism multiplies the analytical view-points.

Louise Owen analyses an artistic-literary reflection on the crisis, which invites us to focus on the problem (but also on the possibility) of the «collective social body as *demos*»; in the recent adaptations of Aeschylus' trilogy *The Oresteia*, examined in the essay, the theatrical space has been transformed into

a «space of community, of political expression». The problem of the *demos* is also at the centre of Roberta Calvano's essay; her analysis of the legal mechanisms triggered in response to the economic crisis shows a «decision-making process increasingly secluded from public debate» and a substantial depletion of the political representation systems. In other words, the crisis reopens an ancient problem connected with a more general wearing down of the democratic process of participation in the production of political decisions. The phenomenon, in fact, also affects the formation of public opinion and the exercise of direct democracy. Lucia Barbone and Erik Longo survey this kind of problem, studying data on the relationship between immigration regimes and welfare state – an «issue that is first and foremost political and only marginally legal». In their analysis they highlight «the lack of accurate data as a basis for the public debate» in the recent decision process on Brexit. The philosophical weighting of the problem in Jean-Philippe Pierron's essay confirms the picture. In times of crisis, decision-making processes of a *predictive* nature (based on diagnosis produced by scientific knowledge and expertise) tend to prevail over those of an *anticipatory* nature (deriving from the exercise of «political will»). The specific issue is to re-appropriate a «voluntarist concept of decision» with which the social and political body can return to build a «perspective» between «ethical imagination and anticipation». In this *post-traditional* society, however, it is not so much a question of returning to past analyses on the issue of freedom, but (and this is not an easy task) much more one of «discovering new forms of choice».

The third part of the book, *the interdisciplinary challenge*, focuses on some methodological and epistemological implications of our problem for legal and human sciences. Understanding the crisis, its manifestations, its effects, imagining solutions to the problems posed by the crisis, all call for a willingness to question disciplinary methods, and enable dialogue between different forms of knowledge. This issue is explored in the book from three different perspectives.

The first, in Flavia Stara's essay, focuses on the relationship between epistemological-cognitive and ethical dimensions, such as the relationship between *logos* and *praxis*. Starting with an intercultural approach to the problems and challenges of the contemporary world, Stara shows how the «theoretical and epistemological intercultural instance», in order to translate into ethical and political proposals, questions humanistic, social and legal knowledge, defying «any specific subject paradigm of knowledge and competence». The second

approach is that of checking the autonomy of a scientific discipline. Paolo Palchetti reflects on the features that international law is required to assume at the present stage. The problem in question is how to update the scientific method of international lawyers, from the traditional «rule-based approach» aiming to «describe what the law is» to an approach open to «non-normative and extra-legal elements»; it is a matter of attributing to this legal science also an *explanatory* (the «why of the law») and *prescriptive* («what the law should be») capacity. The third approach (Meccarelli) considers the relationship between a specific legal problem and its pre-legal premises. The study of rights in times of crisis, in fact, urges to include in the legal discourse a moment of *cognitive diagnosis of the social*; it is a hermeneutic moment that the traditional method of implementing legal sciences does not allow, and that implies openness to interdisciplinary dialogue.

The three approaches converge in considering the opportunities that dialogue between disciplines and areas of knowledge – especially in the form of a multi-disciplinary debate – offers for dealing with such problems. It is in particular a matter of experiencing a methodological practice in which each discipline has the opportunity to give its own analytical contribution. By complementing the other disciplines and, at the same time, enriching its own base of epistemic references, each area of knowledge – as well as each scientific discipline – will be able to grasp novel reasons for its own autonomy. This book is intended as an attempt at this methodological practice.

THE CRISIS AS A SOCIAL OBJECT

NARRATING THE CRISIS: FICTIONS OF FINANCE IN CONTEMPORARY BRITISH NOVELS

Silvana Colella

Fiction must stick to facts, and the truer the facts the better the fiction – so we are told.

[Virginia Woolf, *A Room of One's Own*, 1929]

The name of the game is not whether your novel honours reality; it's all about what you can get away with.

[Lionel Shriver, «Fiction and Identity Politics», 2016]

1. Introduction

Throughout the history of capitalist modernization, the cycles of bubbles and crashes, the grandiose ambitions of visionary speculators, and the distress caused by crises have been refracted in the figurative prism of literature. From Daniel Defoe's satirical personification of Lady Credit – a capricious, inconstant and effeminate presence waiting to be “mastered” – to twenty-first century anxious refigurations of algorithms as impersonal and all-powerful financial villains, writers have used the medium of fiction to reframe the “facts” of finance and reassess its myths.¹ Nineteenth-century novelists paid special attention to financial speculation as an increasingly democratic phenomenon, attracting investors from all walks of life. Even though the majority of the population could hardly afford to buy stocks and shares, novelists were drawn to investigating the dangerous allure of speculative schemes, alerting readers to the risks they entailed. More explicitly than other fictional modes, «realism is invested in an economically situated conception of history».² In their realist novels, Dickens, Trollope, Thackeray, George Eliot and other Victorian authors created memorable figures of speculators, eloquently de-

1 On Defoe's understanding of public credit see Sherman (1996). In his history of financial crises, Kindleberger mentions several examples of literary responses to manias and panics, see Kindleberger (2005). On the contemporary vogue for financial thrillers see De Boever (2015), pp. 24-38.

2 Shonkwiler and La Berge (2014), p. 17.

nounced financial malfeasance, imagined poignant scenes of bankruptcy, and explored the impact of financialization on the everyday life of their characters, casting a sharp critical eye on what was then a new economic order, even as they appreciated some of its features.³

Small wonder that when the 2008 financial meltdown shook the world, some commentators reached for Victorian novels – *Little Dorrit* (1857) and *The Way We Live Now* (1874) in particular.⁴ Although the financialized world we inhabit is markedly different from the one Dickens and Trollope knew, the feelings of dismay and outrage articulated in their fiction find a distinct echo in today's concerns. We may not concur with their moralistic perspective, but the indignation conveyed by Dickens and Trollope's satires against the excesses of finance is arguably a sentiment contemporary readers can find congenial. Indeed, it is no exaggeration to say that the critique of financial speculation these authors so forcefully vented in their fiction is now hegemonic. The animosity against Wall Street and the City of London, the contempt for big speculators and corporate managers «who profit from risky decisions but are protected from failure by “golden parachutes”», as Žižek observes, is now shared at both ends of the political spectrum, by conservative Republicans as well as left-wing radicals.⁵ The crisis has sharpened the perception that the financial sector is increasingly detached from the “real economy” and that the interests of Wall Street and Main Street are divergent. Though this is not really the case, economists would argue, there is a widespread sense that the barons of finance have gone too far, governments have been too weak, and the 99% have had to bear the brunt. As Mervyn King, the then Governor of the Bank of England, told the Treasury Select Committee in 2011 «The price of the financial crisis is being born by people who absolutely did not cause it».⁶

We are still smarting under the consequences of the credit crunch. Žižek predicted in 2009 that the «primary immediate effect» of the crisis would be «the rise of racist populism, further wars, increased poverty in the poorest Third World countries, and greater divisions between the rich and the poor within all societies».⁷ His predictions were not wide of the mark. Today, almost ten years after the event, populism, racism and terrorism are on the rise,

3 See Wagner (2010); O’Gorman (2017) and Poovey (2009).

4 See Preston (2012); Adler (2014); Packer (2013).

5 Žižek (2009), p. 12.

6 See Inman (2011).

7 Žižek (2009), p. 17.

and the gap between the rich and the poor, «the Included» and «the Excluded»,⁸ is widening. The idealization of the free market, in conjunction with democracy and choice (the neoliberal doxa) has come under attack both before and after the recent financial storm. However, as Žižek and Mark Fisher contend, the feeling that there is no real alternative to capitalism is pervasive. Fisher has termed this ideological formation «capitalist realism»; he defines it as «the widespread sense that not only is capitalism the only viable political and economic system, but also that it is now impossible even to *imagine* a coherent alternative to it».⁹ The crisis has revealed prodigious flaws in the machinery of financial capitalism, generating much criticism leveled at both the irrational exuberance of financial markets and at the staggering bailout packages devised to restore confidence in them. Yet «ideological naturalization», Žižek claims, «has reached an unprecedented level: rare are those who dare even to *dream* utopian dreams about possible alternatives».¹⁰ Capitalist realism, or «pragmatic realism» in Žižek's definition, seems to be the order of the day.

Realism, of course, is both an ideology and a representational mode. It is therefore apposite to ask: how is the crisis narrated in contemporary *realist* novels? Has the credit crunch fostered utopian dreams or pragmatic realism? How do novelists deal with the facts and fictions of finance? The sample of novels that I shall examine in this essay is limited. I have selected only texts by British authors written after the crisis and focusing specifically on the financial world centered in the City of London: Sebastian Faulks's *A Week in December* (2009), John Lanchester's *Capital* (2012), Justin Cartwright's *Other People's Money* (2011), and Gavin Extence's *The Empathy Problem* (2016). All these novelists show a marked preference for the classic realist mode, variously adapted to the contemporary stories they tell. This essay aims to elucidate what kind of financial narratives they articulate, how they construct the experience of crisis and how their stories relate to the ideology of capitalist realism. I shall discuss each novel separately, focusing on what realist fiction does best – the invention of characters and plots that test the limits of what we believe.

8 Žižek (2009), p. 91.

9 Fisher (2009), p. 2.

10 Žižek (2009), p. 77.

2. «The fantastic circuitry of finance»: *A Week in December*

Sebastian Faulks's novel is set in London at the end of 2007. It is structured as a multi-plot narrative with each storyline centred on a different character. The cast of characters includes an embittered literary critic, Tranter, who takes special pleasure in bashing fellow writers; a hedge fund manager, John Veals, who is devising a trade of such scope and magnitude that it threatens to bring down global markets; a radicalized young Muslim, Hassan, planning an imminent terrorist attack; Jenni Fortune, a Tube driver, passionate about reading, who spends most of her free time in the virtual world of a popular online game; and the wife of an ambitious MP who is organizing a dinner party that will, eventually, bring together most of the characters whose stories readers have been following throughout the narrative. As this brief overview shows, the financial plot is one of the many strands the novel pursues, but it is central to the representation of contemporary London.

There is a sense of impending threat hanging over the story, determined both by the actions of the newly radicalized Jihadist, and by the risky machinations and unscrupulous scheming of the financier who, with the aid of his acolytes, manipulates the market to his own advantage. Neither the terrorist attack, nor the global financial collapse becomes actual events in the narrative. Faulks concentrates on the troubled times preceding major detonations. He is particularly interested in detailing how John Veals concocts his plan, what instruments and strategies he uses to short sell a well-established bank, and how speculators and hedge fund managers go about their daily business, courting risk and skillfully navigating the shadowy border between the legal and the unethical. Noticeable is the degree of didacticism that Faulks's realism has to bear when it comes to articulating the mysteries of finance (for the lay reader). Here is one prime example of Faulks's informative and pedagogical aesthetic:

The simple, but perhaps too simple, thing to do was to short sell the stock. This meant first borrowing a vast number of ARB shares from an insurance company or some other registered owner who specialised in lending stocks; then selling it at whatever the market would offer; and, finally, repurchasing it at a much cheaper price when the market had collapsed and returning it to its owner. The profit was in the difference between the price at which they'd sold and the lower one at which they had rebought. [...] The second obvious thing to do was to buy "put" options on ARB stock. These gave them the right to sell the stock at a pre-agreed or "strike" price [...].¹¹

11 Faulks (2009), p. 64.

In this case, the narrator is doing the explaining; in other scenes, specific information is conveyed through dialogues between financial professionals.¹² The novel contains useful clarifications about credit default swaps, subprime mortgages, and other infamous tools of the financial arsenal. This factual anchoring of the text has a pronounced documentary effect that renders the financial plot a curious hybrid: while the pedagogical aesthetic aims to counteract the notorious abstractions and mysteries of financial operations with a solid dose of particulars and concrete explanations, the satirical perspective Faulks adopts confers upon the character of the financier the abstract quality of the typical. «The real problem with Veals», as one reviewer put it, «is that he never lifts off the page».¹³ Obsessed with secrecy (he does not do emails), motivated only by profit («the only aspect of human life that interested Veals was money»), unperturbed by ethical issues («the distinction between “legal” and “ethical” was of no concern to him»), indifferent to his wife (he «found the dividend of carnal pleasure a brief and poor return for the hours of tedium he’d invested»),¹⁴ Veals comes across as a modern, cynical rendition of many stock-market villains of nineteenth-century fiction, held *individually* responsible for the wrongs of an entire system. He has never read a novel, does not go to the cinema, detests holidays and art galleries, and has «no social life outside the office».¹⁵ Hardly human, this financier serves one important textual function: through his perspective readers are encouraged to see the distortions of finance as the result of unfettered individual greed. Faulks is also alert to the broader context. His representation of the financial sphere includes descriptions of how easy it is for clever traders to exploit loopholes in the legislation, and to devise ever new, sophisticated instruments in order to dupe regulators. But the focus on one obsessed individual, accumulating millions with one epic trade, reduces the systemic to the subjective, encouraging a sweeping condemnation of the stereotype of the financier, driven by instrumental rationality and swayed by an anxious identification with money. For all his precision in mapping out the febrile activities of financial actors in the months leading up to the crisis, Faulks then falls back on a generic,

12 As the reviewer for the *New York Times* notices, Faulks indulges in «business school lectures», see Cowles (2010).

13 Cartwright (2009); for the *Financial Times*, likewise, Veals is a «cardboard monster», see Hill (2009).

14 Faulks (2009), pp. 269, 69, 235.

15 Faulks (2009), p. 269.

abstract form of critique that pits the blame on greed and on the «functional autism» of the likes of Veals.¹⁶ The novel's final words appropriately sum up Veals's sense of absolute mastery upon realizing that his company, High Level Capital, has accrued a capital gain of £12 billion:

But I have mastered this world, thought John Veals, passing his hand over his newly shaved chin. To me there is no mystery, no nuance, no complication; I am a man alive to the spirit of his time, the one who hears the whispers on the wind.

A rare surge of feeling, of something like vindication, came from the pit of his belly and spread out till it sang in his veins. As he stood with his hands in his pockets, staring out over the sleeping city, over its darkened wheels and spires and domes, Veals laughed.¹⁷

The triumphant laughter of this self-appointed master of the universe is arguably meant to solicit public outcry against the lords or barons of finance and their spiteful callousness. But whether it does or not is a moot point: the novel ultimately tends to reaffirm a reassuring vision of reality, despite much social satire. Just as Veals gets away with his machinations, so too other characters get rewarded with comedic or romantic endings. Hassan does not carry out his terrorist plot, choosing love over fundamentalism; Jenni Fortune too is rewarded with real romance, a more nourishing substitute for the immersive virtual reality game she used to play; and even the embittered literary critic (turned novelist) obtains a degree of financial security that might placate his ferocious pen. In a novel that sets out to portray contemporary London under the double threat of terrorism and financial collapse, such endings appear consolatory, suggesting a desire for normality and private solutions that tempers down the asperities of social criticism. «The fantastic circuitry of finance»¹⁸ gets a fair bashing in this text, but the laughter of the triumphant financial villain is a reminder that not much has changed or will change.

3. «Where do we go from here?»: *Capital*

«There is a general sense of needing to understand what has happened», writes Lanchester in *Whoops! Why everyone owes everyone and no one can pay* (2010), «it is difficult to accept the reality that in a downturn this sharp,

16 Faulks (2009), p. 103.

17 Faulks (2009), p. 390.

18 Faulks (2009), p. 103.

in face of an economic crisis so systemic, we are no longer in control of crucial aspects of our lives».¹⁹ The feeling of not being in control, arguably shared by many, has motivated Lanchester to write two books of popular economics – *Whoops!* and *How to Speak Money: what the money people say – an what they really mean* (2014) – which aim to bridge the knowledge gap between «the people who understand money and economics and the rest of us», and to dispel the exoteric aura of financial jargon.²⁰ While *Whoops!* is a witty account of the crisis that elucidates for «the rest of us» complex financial matters, *How to Speak Money* provides the uninitiated with a handy economic lexicon, flanked by a long introduction and an afterword in which the author addresses the vexed issue of «where do we go from here?».²¹ His stance is one of mild optimism, grounded on the belief that gradual change is possible, given the right set of “tools”: «Some readers may be disappointed that I am not advocating more explicit alternatives to capitalism», Lanchester concludes, «I might well advocate one if I could see one that seemed to be working».²² His pragmatic realism is unmistakable.

How does *Capital* imagine change? The novel begins in December 2007 and ends after the collapse of Lehman Brothers one year later. Like Faulks, Lanchester opts for a panoramic, condition-of-England novel, reminiscent of nineteenth-century social realism, in which the financial plot is one of several storylines centred on a diversified set of characters: Roger Yount, the investment banker, and his deputy, Mark; Quentina, an illegal immigrant from Zimbabwe, working as traffic warden; The Kamals, a family of British-Pakistani shopkeepers; Zbiengnew, a Polish construction worker; Matya, an Hungarian nanny; a successful artist, Smitty, whose identity is unknown to the public, and a host of other, less prominent figures. Some of these characters reside in Pepys Road, others simply work there: this fictional street (in south London) provides the unifying focal point where the various strands of the narrative intersect. Reviewers have pointed out the similarities between *Capital* and its Victorian antecedents mostly to highlight the deficiencies of contemporary attempts to reproduce the broad social scope of Dickens's, Trollope's or Balzac's novels. As Theo Tait wrote in *The Guardian*: «the recent fashion for neo-Victorian condition-of-England novels in the vein of *Little Dorrit* or *The*

19 Lanchester (2010), p. xv.

20 Lanchester (2014), p. xi.

21 Lanchester (2014), p. 269.

22 Lanchester (2014), p. 276.

Way We Live Now – featuring a range of emblematic intersecting lives and at least one City villain – looks unlikely to produce any great works of art. These books seem basically programmatic and unoriginal, fatally in hock to the news agenda». ²³

For Lanchester, the news agenda included the banking crisis that he had so thoroughly explored in *Whoops!* His focus in the novel is on two generations of financial actors: senior investment bankers, like Roger and his German boss Lothar, who struggle to come to grips with sophisticated financial instruments, and a new generation of mathematically gifted «boys» who are able to understand and exploit the predictive power of algorithms. Roger Yount, the narrator observes, «would have fitted seamlessly in the old City of London [...] where everything depended on who you were and whom you knew, and how well you blended in». ²⁴ When the novel begins, the old City of gentlemanly capitalism has already been replaced by the new City of financial engineering, run by smart young traders with a penchant for «immensely complicated mathematical formulae». ²⁵ Roger's deputy, Mark, is one such wizard. In a telling scene at the onset of the story, Roger and Lothar are unable to make much sense of Mark's number crunching while he is briefing them on the foreign exchange trades they are supposed to be supervising. A certain air of bonhomie envelops the senior bankers, loyal to slightly antiquated rituals, concerned about their inability to keep up with the fast pace of change in the financial world, but also solidly attached to their self-interest. Roger's thoughts, when he first appears in the novel, revolve around his annual bonus, which he has reasons to believe will reach a million pounds. However, since the bank has suffered major losses in the wake of the subprime crisis, Roger's bonus turns out to be a more modest affair of £30.000. The trajectory of his story is then set as one of gradual decline and partial redemption. Unlike Veals, Roger is no financial villain; his main preoccupation is not how to manipulate the market and get away with it, but how to communicate with his wife, deal with his children, manage the family's unrestricted patterns of consumption and, towards the end of the novel, imagine a different future after his dismissal from the bank.

The character who embodies financial masculinity at its most ambitious and villainous is Mark, the junior upstart scheming to outwit his boss. Fu-

²³ Tait (2012).

²⁴ Lanchester (2012), p. 15.

²⁵ Lanchester (2012), p. 24.

elled by a burning desire to escape middle-class, «suburban mediocrity»²⁶ by accessing the fast track of social mobility that a job in the City provides, Mark develops a grandiose plan to prove his worth:

The plan was simple. Trade, not on his own account – he was no thief, thank you very much! – but on the bank's, until he had made, say, £50 million. Serious money. An amount which didn't risk the bank but which was irrefutable evidence of his talents. Then, fess up. Tell them what he had done and let them draw the obvious conclusion: that he was a risk-taker with a proven talent for delivering spectacular returns, and there were fifty million reasons for giving him what he wanted – which, in the short term anyway, was Roger's job.²⁷

The implementation of this scheme entails taking extremely risky positions, making big bets on foreign currencies, by logging on to colleagues' accounts without their knowledge. His unauthorized trading, conducted under his boss's nose, does not last long. Charged with fraud, Mark exits the scene of the novel as a criminal, bringing down with him not only Roger, dismissed for «gross negligence», but the good reputation of the bank.²⁸

What is interesting in this subplot is that the narrative of fraud, a staple of financial novels as La Berge has argued,²⁹ is presented as a story of illegitimate ambitions, a tale of denied social mobility, reminiscent of nineteenth-century plots in which the lower-middle-class upstart (like Mark in this text) is punished for daring to ask for more. Having internalized the ideology of the City as a democratic space where each individual has a real chance of re-fashioning his destiny («the City is one of the few places where you are allowed to be extraordinary»),³⁰ Mark believes that he can escape from the «stifling» world his parents inhabit by performing «extraordinary» feats of financial shrewdness.³¹ But in the conservative agenda of this novel, Mark's desire for change, presented in chapter 35 as a class-related issue, finds no legitimate outlet. The moral of his story is twofold: on the one hand, a warning against the temptations of financial felony, on the other, a more insidious condemnation of social mobility, cast in a negative mould and equated with the desire

26 Lanchester (2012), p. 192.

27 Lanchester (2012), p. 447.

28 Lanchester (2012), p. 467.

29 See La Berge (2015).

30 Lanchester (2012), p. 192.

31 Lanchester (2012), p. 193.

to *usurp* the privileges and prerogatives of the upper classes. The financial villain, in *Capital*, is no grand baron or overlord, no master of the universe like Veals imagines himself to be in the last chapter of *A Week in December*. Rather, Mark is described as a puny individual, nourishing excessive ambitions that the narrative conveniently curbs, thus reaffirming a conservative vision of social stability in which cross-class transitions are ruled out.

The novel's structure further confirms the compartmentalization of social space; each character is placed in a specific sphere or class that delimits the borders of their separate stories. Social immobility, however, does not go entirely uncontested in the novel. Mark's bungled attempt to flee from mediocrity is one example. Another is provided in the novel's detective subplot, which hinges on the mystery of postcards, bearing the caption «We Want What You Have», secretly delivered to the inhabitants of Pepys Road. «We want what you have» is the slogan of social envy, rooted in the illegitimate desire to appropriate the life-style and social status of those who earn a sufficiently high income to afford residence in a posh area. Not surprisingly, the perpetrator of such bizarre scheme is another small individual (the assistant of a famous and very rich artist), who occupies a position structurally similar to that of Mark and nurses an analogous desire to step up in the social ladder. In this case too, the moral of the story is insidiously conservative: the criminals in the novel are the puny characters whose dissatisfaction with their lot can only be channeled via illegal activities. In Lanchester's social imaginary, dissatisfaction leads to crime, not change. This stance could be considered realistic: as the divide between the rich and the poor, those who "have" and those who "want", continues to widen, social mobility is bound to appear as a far-fetched utopia. On the other hand, however, to criminalize those who "want" means to foreclose the possibility of change, even on a small scale.

It is symptomatic that the word "change", repeated as a mantra by Roger, is the novel's last word: «I can change, I can change, I promise I can change change change».³² The banker who has lost his job, but owns a multimillion-pound house whose sale will ensure a steady level of comfort for his family at least in the short run, is entitled to imagine a change for the better. This change is predictably presented as a moral choice between excess (which he can no longer afford) and the refined moderation of a life spent in the countryside, possibly running a small business and getting back in touch with the

³² Lanchester (2012), p. 577.

“real economy”: «He was done with the city and with the City [...] done with earning twenty or thirty times the average family’s annual income for doing things with money rather than people or things [...] It was time to do or make something».³³ Downward social mobility for the rich is presented as an opportunity to rethink the core values according to which they lead their life: ethical, responsible capitalism and more moderate patterns of consumption are imaginable changes. Upward social mobility, on the other hand, even in the democratic environment of the City, is unimaginable except in the shape of fraud or petty crime. The capitalist realist lesson this novel teaches is rather chilling. Capitalism may reinvent itself as “creative”, “cultural” or “ethical”, especially in the aftermath of the 2008 credit crunch. But imagining how this turn may foster social equality and more opportunities for a greater number of people remains impossible, at least in the ideological agenda of this novel. It is but fair to add, at this point, that Lanchester does include moderately successful immigrant workers, like the Polish builder and the Hungarian nanny, in the social space of the novel and imagines for them a future of slow accumulation of capital, honestly earned, and much deserved love. It would appear that London’s openness towards immigrants has the potential to change lives for the better. But reading this novel in the light of the Brexit referendum, one is licensed to wonder whether this idyllic vision will have any traction in the future.

4. «And now they believe their own myths»: *Other People’s Money*

Justin Cartwright’s *Other People’s Money* does not aspire to be a state-of-the-nation novel, though it retains a focus on the financial world, rocked by the «turmoil and madness» of the 2008 meltdown.³⁴ The crisis has affected, in minor or major ways, all the main characters in the novel – from the investment banker, Julian, who has bought toxic assets and is now facing considerable losses, to the junior reporter, Melissa, who has to go freelance since the advertising revenues of the local newspaper for which she writes are in steep decline, and to the playwright, actor manager, Gaelic scholar Artair McLeod, whose grant has been suspended. As Artair complains in one moment of exasperation: «the spivs in London and Wall Street and Frankfurt have lost

³³ Lanchester (2012), p. 573.

³⁴ Cartwright (2011), p. 42.

hundreds of billions pissing into the wind and now I can't even get my grant. Yes, I'm down. Are you surprised?»³⁵

This is not, however, a novel about the precarious, impoverished condition of young graduates like Melissa or about the struggle for survival of provincial theatres, starved for lack of funding. Rather, the centre of attention is the figure of the disaffected or reluctant investment banker, Julian Trevelyan-Tubal, who longs for a simpler form of life and is determined to escape from the «rotten» world of finance and banking. Not an easy task to accomplish, since the bank of which he is chairman – a family-owned business, founded by his forefather in 1671, and renowned in the City for its impeccable reputation of solidity – is suffering severe losses due to ill-advised investment choices, which include, of course, «the sub primes and collateralized debt instruments they bought and the hedge funds they financed».³⁶ When the novel begins, we are told that Tubal & Co. «is now stuck with \$800m. of utterly useless and finely diced mortgages in territories they have never visited».³⁷ Dazzled by the prospect of quick profits, the traders and «hedgies» have taken enormous risks, while the senior management has failed to understand what kinds of bets they were placing. The financial plot revolves around Julian's subtle maneuvers, some of them bordering on the illegal, to cover up the extent of the bank's liabilities prior to selling Tubal & Co. to American tycoon Cy Manheim.

Unlike Veals and Roger Yount, Cartwright's investment banker, Julian, is a financier with a troubled conscience. He perceives the world he is immersed in from a critical, ironic distance: he is in it but not really of it. Most emphatically, Julian professes not to believe in the self-serving myths or social fictions that «the cultural circuit of capital»³⁸ reproduces to justify its existence. In the novel, his thoughts and observations carry a considerable ideological burden, as they represent an internal front of opposition to the financial industry in which Julian is nonetheless a major player:

This rotten, crumbling industry resting on greed and half-truths; this pretense that Tubal's itself is somehow special, that the people who work in banking are particularly

35 Cartwright (2011), p. 63.

36 Cartwright (2011), p. 15.

37 Cartwright (2011), p. 15.

38 See Thrift (2001), p. 415. Thrift defines what he calls «the cultural circuit of capital» as a «machine for producing and disseminating novels to business élites» and dates its emergence in the mid 1990s. On the social fictions of finance see Heiven (2014).

talented, that the government is principled, that the old country still possesses ancient wisdom and deeply bedded human standards.

It's all a sham: the ludicrous royal family in their castles and palaces, the Army pounding away hopelessly at mud houses in recalcitrant villages far away, the wretched government with its desperate determination to save its skin by issuing more and more ineptly populist statements of intent and benchmarks and guidelines and tables and un-enforceable laws. And worst of all, we, the bankers, believing we could produce money out of thin air. Instead we lost nearly \$600m.³⁹

Italicized in the text, Julian's words openly express his abhorrence not only of the arrogant financial sector but also, more broadly, of the ineptitude of a «wretched government» and a ruling class in thrall to the business ontology. Yet, as the novel shows quite shrewdly, it is precisely this oppositional stance, this critical conscience that allows Julian to perform his duties successfully as he negotiates the sale of the bank. In the process of finessing the deal, he tests the boundaries of the legal more than once, proving quite adept at practicing what he condemns. In one final ironic twist, Julian, the reluctant banker, comes to resemble his father, who firmly endorsed the myths of finance, the more he seeks to position himself as a critical contrarian: «you sound», observes one of his colleagues towards the end of the novel, «more like your old dad everyday. He saw the workings of democracy as pure opportunism». ⁴⁰ Žižek's understanding of «contemporary cynicism» may be helpful to explain the ideological mechanism this novel captures in the representation of the disillusioned banker. Contemporary cynicism, Žižek writes, represents «an exact inversion of Marx's formula: today, we only imagine that we do *not* "really believe" in our ideology – in spite of this imaginary distance, we continue to practice it». ⁴¹ Whether cynical or simply self-deluded, Julian's resistance to finance defines his uneasy subjectivity *and* motivates him to conduct his trades with redoubled zeal. ⁴² By exploring both sides of the equation (brooding internal defiance equals successful external performance), the novel provides a somber assessment of the efficaciousness of resistance. Julian does succeed in selling the family bank, extricating himself from the onerous task of being an active player in

³⁹ Cartwright (2011), pp. 102-103.

⁴⁰ Cartwright (2011), p. 246.

⁴¹ Žižek (2009), p. 3.

⁴² «So long as we believe (in our hearts) that capitalism is bad», observes Mark Fisher, «we are free to continue to participate in capitalist exchange», see Fisher (2009), p. 13. Cartwright's novel exposes the workings of this ideology.

a «rotten, crumbling industry resting on greed and half-truths»; but the novel clearly shows that the rotten industry of finance, far from crumbling, is stronger than ever and that disaffected, ironic players contribute to its resilience.

Cartwright also considers other forms of resistance to financial power besides Julian's self-doubts. The subplot centered on Melissa and the intrepid left-wing editor of the newspaper, the *Cornish Globe and Mail*, for which she writes brings to the fore the role of the press in uncovering and denouncing financial malfeasance. In possession of secret documents, leaked by a disgruntled former employee of Tubal & Co., Melissa and her boss try to mount a media campaign with the intention of exposing «a massive fraud» that will bring down «a family so grand that they believe they are untouchable» (210).⁴³ Predictably, their scheme fails, easily quashed by the American financial mogul Cy who buys out the newspaper group, silencing the *Globe and Mail* for good. Public opposition is rendered null, and the threat of exposure contained, by the sheer persuasive force of big money. The press can be bought.

Can art be bought too? In the novel, art is presented as the sphere of non-alienation where human creativity continues to flourish despite the severe impact of the crisis. Artair McLeod, writer and theatre manager, stands at the opposite pole from Julian: while the latter is wrecked by doubts about his role and professes to loathe the financial sector, the former has an unwavering faith in art and «genuinely believes that art is something real, and necessary, something that should be privileged over any other human activity».⁴⁴ Cartwright contrasts the squalid environment where Artair lives (a dilapidated boathouse facing a sea of mud) with the loftiness of his ideals: «the transformative power of art», Artair muses, «is everything. His life has been a string of triumphs and disappointments but he has always been sustained by the certainty that life is for living according to your highest aspirations. Life is for burning up. And a life lived in the pursuit of art is the only one worth living».⁴⁵ If the financial world produces either troubled subjectivities (Julian) or the arrogant pursuit of risk and profit (Cy), the art world seems to exist in a reality of its own, hinging on a set of alternative values that sustain its votaries even in times of crisis. Of course, this distinction exists in the novel only to be disputed. As readers discover early on in the story, Artair's annual income is provided by a generous donation of the Tubals family trust, willing

43 Cartwright (2011), p. 210.

44 Cartwright (2011), p. 66.

45 Cartwright (2011), p. 120.

to support the artist not for the excellence of his vision, but in exchange for the promise never to contact his former wife, Fleur, now part of their family. There is a lot that money can buy. While the novel never implies that with this purchase Artair's creativity becomes enslaved to finance, and his ideals hollow and illusory, Cartwright portrays Artair's grand project («a five-hour play on the life and novels of Flann O'Brian»)⁴⁶ in an amused satirical tone as a creation that is unlikely to have any impact or to make much difference. Art and finance go their separate ways: the artist whose acquiescence with the Tubals's diktats is easily bought poses no real threat to their power, and the products of his imagination, likewise, seem destined to be sublimely irrelevant; the financial industry, on the other hand, will continue to play its games, «in thrall to fables»,⁴⁷ as Julian believes, but wielding real power nonetheless.

None of the novelists I have discussed so far imagine the sphere of literary or artistic production as a possible site of resistance: Faulks's literary critic and novelist, Tranter, is notable for his rabid reviews, lingering adolescent narcissism and revengeful feelings, but this anger is aimed at his peers and takes no notice of the wider world; Lanchester's Smitty, «a conceptual artist who specializes in provocative temporary site-specific works»⁴⁸ has made enough money selling his anonymous, anti-bourgeois art to rich bourgeois collectors that he can sit comfortably on his success, playing a minor role in the narrative; gently deflated by a disenchanted narrator, Artair's idealism hardly qualifies as militant in Cartwright's novel. Yet, these authors have all welcomed the challenge to write about the increasing reach of financialisation, the credit crunch crisis, the irresponsible behavior of traders and hedge fund managers, and to do so in a critical way, whether through satire or relying on the power of fictional narratives to stir doubts and solicit questions. That their fictions reserve to writers and artists only the space of the ineffectual (and the narcissistic) is a wry commentary on how difficult it is, in the present juncture, to imagine a re-politicized realm of art, literature and culture more broadly in which contestation and opposition are not written out. The capitalist realism of these novels may be «resigned» or «plutocratic» but it is also alert to the limits of its own vision.⁴⁹

46 Cartwright (2011), p. 20.

47 Cartwright (2011), p. 80.

48 Lanchester (2012), p. 86.

49 For an interesting discussion of the «plutocratic imagination» and the «resigned» realism of contemporary American novelists see William (2016). See also Walonen (2016).

5. Creative destruction: *The Empathy Problem*

From the Occupy Movement to the Movements of the Squares, examples of public resistance to finance and financialization have not exactly been lacking, nor have they failed to expose blatant contradictions. “We are the 99%” – the slogan of the Occupy Movement – effectively captures the stark imbalances in the global distribution of wealth that the crisis has further aggravated. Gavin Extence’s *The Empathy Problem* takes due notice of these recent outbursts of collective dissent. The story takes place in the months when the City of London became the stage for a prolonged Occupy demonstration. In the second chapter, the presence of vociferous demonstrators – «armed to the teeth with banners and tents and tarpaulins»⁵⁰ – causes the «irritation» of Gabriel (hedge fund manager), delayed in a traffic jam while trying to reach his office: «Gabriel wasn’t paid 3.4 million a year», we are informed, «to roll into the office whenever he felt like it».⁵¹ With assets of about four billion pounds, Gabriel’s company, Mason Wallace Capital Management, has gained colossal sums of money by betting on the collapse of the Greek economy. This is the City that has triumphantly survived the crash, rising from the ashes more defiant and unstoppable than ever. Gabriel is the very epitome of this triumph: thirty-two years old and incredibly handsome, he boasts of making more money in six months than any of the demonstrators «would earn in a lifetime».⁵² For him humanity is divided into two categories, people who are «useful» and people who are «irrelevant»⁵³ – the irrelevant ones are the 99%. He belongs to the highly selected circle of the useful, the rich and the beautiful, firmly ensconced in their own surreal world of gilded isolation.

The “empathy problem” of the novel’s title would appear to be how to make such a brazen, callous exemplar of financial masculinity a believable character according to the standards of realism. Some misfortune must intervene to test his humanity, and it does. Gabriel is affected by an incurable brain tumor; his days are numbered. Rather than a tragedy, however, the novel is a comedy that treads lightly on the topic of impending death. Much of the novel’s dark humour derives from the contrast between Gabriel’s old self

⁵⁰ Extence (2016a), chapter 2. Since I have consulted the Kindle edition of this novel, I will reference quotations indicating chapter not page numbers.

⁵¹ Extence (2016a), chapter 2.

⁵² Extence (2016a), chapter 3.

⁵³ Extence (2016a), chapter 3.

(overconfident, conceited, incapable of empathy) and the new personality he is forced to inhabit when the tumor alters his brain chemistry, leaving him exposed to the power of raw emotions: «It was as if an outer layer of himself had been peeled back, leaving something too sensitive to touch».⁵⁴ Distressed by what the surgeon terms «emotional *lability*» and Gabriel promptly decodes as «emotional *liability*»,⁵⁵ he experiences frequent bouts of crying, a heightened sensitivity to the world around him and to classical music, as well as an irrepressible curiosity about the demonstrators camping outside his office. He listens to their speeches, applauds when prompted, and eventually starts interacting with them as fellow human beings deserving of attention.

The novel, in other words, is a fable of individual redemption: the financial villain, like Scrooge in Dickens's *Christmas Carol* (1843), undergoes an inner transformation that rehabilitates his soul. The transition from egoistic self-interest to sympathy for the sufferings of others is effected in Dickens's novel through the intervention of supernatural forces (ghosts). In Extence's text the same transition is contingent upon a fatal illness. In both cases, it is circumstances beyond one's control that trigger change. *The Empathy Problem*, unlike Dickens's ghost story, however, retains an analytic focus on the reality that Gabriel knows best (finance), complicated by his double vision: on the one hand, he still believes in the truths that circulate in his sphere (City people work hard, earn every penny, or million, they make; "crisis" is best understood as "cycle", and so forth), on the other, by interacting with the "irrelevant" people in the Camp, he comes to see those truths as highly questionable. A supporter of the Occupy Movement, Extence gives much space in the novel to their political philosophy.⁵⁶ But since the third-person narration is focalized on the main character and the story reads as if told by Gabriel's ghost,⁵⁷ what the protesters say comes laced with gentle ironies, enveloped in a thin veil of incredulity. For example, in a rare moment of self-reflexivity, the narrator mocks the very ideal of empathy that this novel otherwise endorses: Mat (one of the demonstrators) «seemed to believe that tea and empathy were the panacea for all the world's social and economic ills. If a problem

⁵⁴ Extence (2016a), chapter 28.

⁵⁵ Extence (2016a), chapter 17.

⁵⁶ In a recent interview, Extence explicitly declares his pro-Occupy position, see Extence (2016b).

⁵⁷ See Bradley (2016a), Bradley observes that Extence has given us «a wonderful narrator whose use of psychic distance is enough to have you feel that this was in fact the ghost of Gabriel Vaughn telling us his tale».

seemed intractable, you hadn't thrown enough tea and empathy at it».⁵⁸ Empathy may not be a panacea for global dramas, but in this novel it certainly functions as a temporary, private solution to the angst Gabriel feels. In line with the fabulistic thrust of the narrative, Gabriel is rewarded with true love, once he becomes capable of true feelings. Romance and empathy teach him that the life he used to have is not worth living: «his luxury apartment, his creature comforts, even his Ferrari – none of this seemed important any more» (ch. 57).⁵⁹ Even work has lost its luster: «nothing I do is for the benefit of the wider community», Gabriel tells his father, «my job is to make money regardless [...] I care about share prices, not economic health».⁶⁰ Illness, love and empathy have produced a complete metamorphosis.

If all this sounds clichéd and predictable, it is because the novel falls into the grooves of a narrative pattern well tried and tested. Like all moral fables, this story does not bank on surprises and unexpected plot twists. Rather, it relies on the certitude that “good” will triumph over “evil”. We know that the hero will be able to turn his life around, as Gabriel does, the moment he realizes his mistakes, because we recognize the pattern underneath the surface of the story. What is perhaps more baffling is why a young author, with declared sympathies for the Occupy protesters and their politics, would opt for the most apolitical form of fiction in order to tell his crisis story. One possible answer is distrust in realism as a “capitalist” mode: for all its clichés and predictability, *The Empathy Problem* simply refuses to accept that dreaming utopian dreams of change is impossible. By pushing the boundaries of verisimilitude, stripping realism of most of its subtleties and ambiguities, turning pragmatism on its head, this novel goes on dreaming. How else to interpret the very improbable plot of creative destruction and wealth redistribution that finally turns Gabriel into a modern Robin Hood?

This plot is based on a simple (and simplified) idea of justice. The new Gabriel, who cares for more than just share prices, uses all his skills to loose money instead of making it. In his final month at work he manages to loose eight hundred and fifty million dollars, ensuring the collapse of the hedge fund. At the same time, he transfers a sizable chunk of the wealth he has accumulated to the secretaries and administrative stuff employed by the fund, offering them a clean start on condition that they «quit [their] job and find

58 Extence (2016a), chapter 46.

59 Extence (2016a), chapter 57.

60 Extence (2016a), chapter 78.

something worthwhile to do instead». ⁶¹ «Why did you do it?» asks Caitlin (Gabriel's girlfriend), «Because it felt right, because I thought it might be nice to see a financial collapse where the rich suffered rather than the poor». ⁶² It cannot get any simpler than that: a return to basics, this is the novel's ultimate philosophy. Emotions and feelings that smooth the rough edges of instrumental rationality; excessive assets, unethically amassed, pulverized in a cathartic potlatch; wealth redistributed to the deserving. Like the angel whose name he bears, Gabriel brings glad tidings.

If this is the type of vision that a political-minded author is able or willing to offer, empathy really is a problem and not just for fiction. But then again, why should we expect fiction to provide plausible answers to complex problems that have no simple solution? *The Empathy Problem* plays quite loosely with realistic expectations, opting for dreams instead of facts. The story is not entirely unrealistic, grounded as it is on a fair dose of historical facts (the crisis, the Occupy Movement), but its deep structure is reassuringly familiar and simplified, harking back to fables and popular myths that are the stuff of dreams. «Sometimes you just need to imagine a better world», Gabriel concludes, «Better than the one you had». ⁶³

6. Conclusion

Considering the novels here under scrutiny, one could argue that the financial crisis has inspired moderation in fiction, a kind of self-imposed austerity on the part of novelists who have chosen a safe investment (realism), avoiding more hazardous speculations in new forms. They have also capitalized on a venerable literary tradition that still attracts the interest of the reading public. Some critics claims that these and other novels of the crisis «have so far proved wholly inadequate to their subject matter, attempting to impose the venerable fictional traditions of realism, personalisation, and moralisation onto a crisis that was in many ways unreal, impersonal, and amoral». ⁶⁴ Though there is some truth in this allegation, especially as regards the tendency to personalise the crisis, it is arduous to imagine what the “ide-

⁶¹ Extence (2016a), chapter 92.

⁶² Extence (2016a), chapter 99.

⁶³ Extence (2016a), chapter 99.

⁶⁴ Crosthwaite (2012).

al” crisis novel would have to look like. The novels Crosthwaite identifies as more adequate alternatives – *Amalgamemnon* (1984) by science fiction author Christine Brooke-Rose and the cyberpunk experiment in “theory-fiction” by Nick Land, *Meltdown* (1994) – were written years before the crisis. Much as we may admire their ability to capture systemic failures, predict the impending downfall of the economic system, and experiment with avant-garde narrative techniques, it is debatable whether apocalyptic visions are more “adequate” than realist ones, or just appear so after the apocalypse.

The novels examined in this essay eschew radicalism, whether ideological or literary. Arguably, they were not written to shake up the sleepy political conscience of readers. The cultural work they perform is more descriptive than predictive. In this respect, they are truly post-crisis novels – committed to refiguring normalization and readjustment within the fictional space of the text. These novels engage the capitalist realist perspective mostly by imagining a return to order while narrating the crisis. But in so doing they also betray an anxious sense that this return is faulty and uncertain: the endings of the various stories narrated (not just the financial plots) are blatantly strained – generous doses of romance in *A Week in December*, an unrealistic redistribution of wealth in *The Empathy Problem*, and a promise of change that changes nothing in *Capital*. Such reassurances, by their very artificiality, testify to the opposite: the way we live now is anything but reassuring. They also suggest that an integral part of the experience of the crisis is the desire for a reliable narrative frame.

The safe investment of novelists working within the formal confines of realism can only go so far. Perhaps the speculative finance of today might best be explored in more speculative types of fiction – utopias and dystopias, New Weird fiction, fantasy, science fiction, and other non-mimetic genres with a focus on futurity – as Crosthwaite and de Boever suggest.⁶⁵ A movement in this direction can already be detected. Lionel Shriver, for instance, well-known for her starkly realist fiction, has turned to the now popular genre of dystopia to imagine a future world (not far from ours) in which the value of the dollar collapses, the United States loses its superpower status, the *bancor* (the international monetary unit theorised by Keynes) becomes the new reserve currency and the equilibria of global governance shift dramatically in favour of a Russian-Chinese consortium, while American citizens experience

65 See Crosthwaite (2012) and De Boever (2013).

the nightmare of sudden and utter impoverishment and lack of freedom.⁶⁶ Undoubtedly, the novel gives us pause for thought: what if this imaginary future is not counterfactual? Are we heading in that direction? Yet, like all dystopias, *The Mandibles* too solicits a degree of nostalgia – nostalgia for the present, the current moment, before things started going horribly wrong. In this respect, speculative fiction may end up confirming the value of what is, just as much as realist novels incline to do. However, both types of narratives ultimately share a desire to question naturalized assumptions, to probe the limits of the fictions (myths, ideologies, narratives) we live by, and to make us see the history of the present from a skewed angle, whether speculative or mimetic. No negligible task, as every writer knows.

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66 Shriver (2016).

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SOCIAL RIGHTS IN CRISIS: ANY ROLE FOR THE COURT OF JUSTICE OF THE EU?

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1. Introduction: the reform of the European economic governance in response to the crisis

The European response to the crisis revolved around two main axis²: financial assistance for Member States in difficulty and the creation of new mechanisms that may yield stronger economic coordination and tighter control on Member States economic choices.³

Since 2008, eight European States have obtained financial assistance that has been provided through a variety of instruments. Early cases, involving non-euro States, such as Hungary, Latvia and Romania, received assistance on the basis of Article 143 TFEU, which envisages the possibility to grant “mutual assistance” to non-Eurozone States facing difficulties as regard its balance of payments. Vice versa, in the first Greek bailout package approved in May 2010 there was no EU mechanism available and, thus, resources had to be provided through bilateral loans by Eurozone States and by the International Monetary Fund (IMF) under a stand-by arrangement.

After this experience, the EU rushed to fill the gap, creating two new bailout mechanisms: the European Financial Stabilisation Mechanism (EFSM) and the European Financial Stability Facility (EFSF). The former was established

1 I wish to express my gratitude to Paolo Pachetti and Massimo Meccarelli, conveners of the seminar “Perceptions of (in)security and forms of legal protection in times of crisis”, held in Macerata on the 11th December 2015, and to the participants. Furthermore, a special thanks goes to Annamaria Viterbo, Andrea Spagnolo and Alberto Miglio for the time spent discussing about these issues and, in particular, the *Ledra* case. All errors remain mine. This chapter has been written in the context of the REScEU project (Reconciling Economic and Social Europe, www.resceu.eu), funded by the European Research Council (grant no. 340534).

2 A third axis consists of measures aiming at creating a safer financial sector in the EU. These measures involved stronger prudential requirements for banks, improved depositor protection and rules for managing failing banks. They set the foundations for the creation of a European Banking Union. See Kern (2015).

3 See generally, Viterbo and Cisotta (2012); Ruffert (2011).

by Regulation No. 407/2010⁴ and it had the capacity to borrow up to a total of 60 million euros. The latter, endowed with more financial resources⁵, has been created by an international agreement and operates as a private company established in Luxembourg. Most of the resources used to provide financial assistance to Ireland and Portugal came from these sources. Conversely, the second adjustment program for Greece was entirely financed by the ESFS.

The need to reduce the risk of contagion through the establishment of a credible firewall pushed Member States to create a permanent mechanism to provide financial assistance to Euro-Area Members experiencing or threatened by financing difficulties. The European Stability Mechanism⁶ was established on 27 September 2012 with a maximum lending capacity of 500 million euros. The ESM intervened to provide assistance to Cyprus, together with a loan by Russia, and to Spain for the bailout of the financial sector. Furthermore, the ESM is also involved in the third financial assistance package for Greece, approved in August 2015.

Each bailout was premised upon the respect by the beneficiary State of a set of policy conditions to be agreed with EU institutions, acting on behalf of the donors. Conditionality is a typical tool used by international financial institutions that serves different purposes. First, it aims to reduce moral hazard and to ensure that resources are used to solve the beneficiary State's problems.⁷ Moreover, conditionality is meant to protect the whole Eurozone against possible negative spill overs (the so-called 'contagion effect'), safeguarding its long-term financial stability by making sure, *inter alia*, that the beneficiary State will be in the position to payback its loan. Tying financial support to the adoption of austerity measures also purports to send a reassuring message to financial markets, by showing concerned States' resolve in trying to address the root causes of the problem. Lastly, conditionality serves deterrent purposes, since, as pointedly observed by Schepel, "States will have to be deterred from pursuing unsound budgetary policies by the prospect of having to live through the same amount of pain and misery inflicted on States assisted by the ESM".⁸

4 Council Regulation (EU) No. 407/2010 of 11 May 2010, establishing a European financial stabilization mechanism, [2010] OJ L 118/1.

5 It had the capacity to borrow up to a total of 440 million euros.

6 The *Treaty Establishing the European Stability Mechanism* ('ESM Treaty') was signed in March 2012.

7 Ioannidis (2016).

8 Schepel (2017), p. 88.

The Commission and the European Central Bank (ECB) are key actors in this context, being them part, together with the IMF, of the so-called Troika since the first economic adjustment programme for Greece. After these informal beginnings, their role has been recognized and codified in legal acts. For instance, Article 13(3) ESM Treaty establishes that, once it has decided to grant financial assistance, the Board of Governors “shall entrust the European Commission – in liaison with the ECB and, wherever possible, together with the IMF – with the task of negotiating, with the ESM Member concerned, a memorandum of understanding (a “MoU”) detailing the conditionality attached to the financial assistance facility”.⁹

The second axis of the European response to the crisis consists of the reinforcement of budgetary discipline by Member States and the creation of a new mechanism for stronger economic policy coordination.

This has been achieved through a combination of EU legislative measures and international law treaties. As for the former, in November 2011 the European Parliament and the Council adopted the so-called ‘Six-Pack’, a bundle of five Regulations and one Directive that strengthened both the preventive and corrective arms of the Stability and Growth Pact and introduced the Macro-Economic Imbalance Procedure.¹⁰ One of the Regulation of this package¹¹ codified the European Semester, a policy coordination framework that brings under a single procedural umbrella both soft and hard coordination and sur-

9 The provision has been copied and pasted in Article 7 Regulation (EU) No. 472/2013 of 21 May 2013 *on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability*, [2013] OJ L140/1.

10 Regulation (EU) No. 1175/2011 of 16 November 2011 amending Council Regulation (EC) No. 1466/97 of 7 July 1997 *on the strengthening of the surveillance of budgetary positions and the surveillance and coordination of economic policies*, [2011] OJ L306/12; Regulation (EU) No. 1177/2011 of 8 November 2011 amending Council Regulation (EC) No. 1467/97 of 7 July 1997 *on speeding up and clarifying the implementation of the excessive deficit procedure* [2011] OJ L306/33; Regulation (EU) No. 1173/2011 of 16 November 2011 *on the effective enforcement of budgetary surveillance in the Euro area* [2011] OJ L306/1; Council Directive No. 2011/85/EU of 8 November 2011 on requirements for budgetary frameworks of the Member States, [2011] OJ L304/41; Regulation (EU) No. 1176/2011 of 16 November 2011 *on the prevention and correction of macroeconomic imbalances* [2011] OJ L306/25 and Regulation (EU) No. 1174/2011 of the Council of 16 November 2011 *on enforcement measures to correct excessive macroeconomic imbalances in the Euro area*, [2011] OJ L306/8.

11 Regulation (EU) No. 1175/2011, above n. 8.

veillance mechanism.¹² In May 2013 the EU legislator adopted two further measures – the ‘two-pack’- aimed at strengthening economic and budgetary surveillance over Euro-States in difficulty and at monitoring budgetary plans of all Euro-States.¹³

In March 2012, 25 out of 27 EU Member States signed the *Treaty on Stability Co-ordination and Governance in the Economic and Monetary Union*,¹⁴ known as the ‘Fiscal Compact’, in order to send out unequivocal signs of their commitment toward budgetary probity. Indeed, the TSCG sets out, *inter alia*, stringent targets in terms of structural deficits, so to make sure that Contracting Parties’ budgetary position is balanced or in surplus.¹⁵ Moreover, Article 3(2) TSCG requires Contracting Parties to bring these rules into effect in their national legal orders “through provisions of binding force and permanent character”.

These measures had a profound impact on the fabric of the European integration process, engendering systemic¹⁶ conflicts with some of its foundational elements.¹⁷ This paper looks at the capacity of the system to deal with these conflicts in order to avoid that they may shake its foundations and further weaken the legitimacy of the integration process. In particular, the paper focuses on the role that the Court of Justice of the European Union (‘the Court’) has been able and/or willing, to play when anti-crisis measures encroach upon fundamental social rights and, more in general, the balance between the social and the economic dimensions within the EU legal order. The first part looks at the departure from the rule of law in the context of bail-out programmes devised to assist Member States that have been hard hit by the crisis. The second part looks at the impact of anti-crisis measures on so-

12 See generally Hallerberg, Marzinotto, Wolff (2012).

13 Regulation No. 472/2013 of 21 May 2013 *on the strengthening of economic and budgetary surveillance of Member States in the Euro area experiencing or threatened with serious difficulties with respect to their financial stability*, [2013] OJ L140/1 and Regulation (EU) No. 473/2013 of 21 May 2013 *on common provisions for monitoring and assessing draft budgetary plans and ensuring the correction of excessive deficit of the Member States in the Euro area* [2013] OJ L140/11.

14 *The Treaty on Stability, Coordination and Governance in the Economic and Monetary Union* was signed in March 2012 by representatives of all EU Member States, but the UK and Czech Republic. It entered into force on 1 January 2013. For an analysis of its legal form and content, as well as its contradictory relationship with EU law, see Craig (2012).

15 Article 3 TSCG.

16 On this notion see Von Bogdandy, Ioannidis (2014).

17 Menéndez (2013), pp. 511-519.

cial rights, examining some of the defining features of the conditions attached to financial assistance packages. The third and fourth parts turn to the Court, critically analysing its role in the new European economic governance and its capacity to preserve some of the foundational elements of the EU legal order.

2. The crisis, the EU and the demise of the Rule of Law

Focusing on the financial assistance axis, Kilpatrick convincingly argued that “EU sovereign debt conditionality in ‘debtor states’ significantly troubles the Rule of Law”.¹⁸ To this end, she pointed to a number of key features of bailout instruments that threatens one of the cornerstone of the European integration process.

Bailout programs are often governed by a mixture of acts of uncertain legal nature, especially due to Member States’ recourse to intergovernmental mechanisms, such as the European Stability Mechanism, that operate outside the scope of EU law. The departure from the Rule of Law is even more evident in those cases where EU institutions and, in particular, the ECB resorted to informal tools, such as secret letters, to put pressure on some Member States in order to force them into socially painful structural adjustment programs.¹⁹ This is what happened, for instance, with Italy that, in August 2011, received a letter²⁰ from the then-President of the ECB and the then-Governor of the Italian Central Bank detailing a list of measures that it had to take and even the legal instruments it had to use. The adoption of these reforms were considered as a condition to benefit from the purchase of sovereign debt paper on the secondary market in the context of the Securities Market Programme, although the letter did not make this link explicit. The same line of action has also been followed with Spain and, although using other forms of pressure, with Ireland,²¹

¹⁸ Kilpatrick (2015b), p. 325. See also Munari (2015).

¹⁹ See generally Viterbo (2016).

²⁰ See *Economia e Finanza - Corriere della Sera*, http://www.corriere.it/economia/11_settembre_29/trichet_draghi_inglese_304a5f1e-ea59-11e0-ae06-4da866778017.shtml?refresh_ce-cp, luglio 2017.

²¹ In this case, the ECB played a key role to force the State to enter in a structural adjustment programme to be negotiated with the Troika. In a letter of 15 October 2010, Trichet reminded to then Irish Minister of Finance the ECB Governing Council’s powers and discretionality in applying collateral rules and in setting limits to ELA. In a subsequent letter of 19 November 2010, Trichet was even clearer on this point, by stating that

Cyprus²² and Greece.²³

According to Joerges and Weimer, the reform of the EU economic architecture had an even deeper impact, perverting Europe's economic constitution and its legal structure.²⁴ In particular, it marks the definitive shift away from the 'integration through law' model toward a form of executive managerialism, which they see as the heir of the new governance model. The main casualties of this move are "the virtues of 'old' traditional law based upon ideas of representative democracy, command and control, rights protection and justiciability, and the stabilization of expectations via formal legal norms".²⁵

Although diverging on several aspects, these perspectives concur on the fact that the departure from the rule of law has been a choice and not an accident. As it often happens in situations that are perceived as having an exceptional character,²⁶ the respect for rules has been perceived as a constraint that could hamper and, thus, make less effective the response to the crisis. Therefore, the characterization of the crisis as an emergency situation allowed decision-makers to adopt exceptional measures to cope with it and getting rid of the constraints imposed by an allegedly ineffective legal framework. In this

"[i]t is the position of the Governing Council that it is only if we receive in writing a commitment from the Irish Government vis-à-vis the Eurosystem on the four following points that we can authorise further provision of ELA to Irish financial institutions: 1) The Irish government shall send a request for financial support to the Eurogroup; 2) The request shall include the commitment to undertake decisive actions in the areas of fiscal consolidation structural reforms and financial sector restructuring, in agreement with the European Commission, the IMF and the ECB [...]". Unsurprisingly the Irish Government bowed in, formally asking for financial assistance on the 20 November 2010.

22 In a Decision of 21 March, the ECB Governing Council made clear that it would have rejected a request of Emergency Liquidity Assistance by Cyprus' National Central Bank unless "an EU/IMF programme is in place that would ensure the solvency of the concerned banks". Also in this case, the pressure put by the ECB was enough to convince the State.

23 On 28 June and 6 July 2015, the ECB Governing Council twice decided to reject the request by the Greek National Central Bank to raise the Emergency Liquidity Assistance, forcing Greek authorities to impose a bank holiday and capital control. These decisions did not refer at all to the breakdown of the negotiations between Greece and EU institutions on the Third Assistance Package. However, it is telling that the very day in which the Tsipiras Government secured a Parliamentary vote on the measures that it pledged to obtain assistance from the EU, the ECB raised the ELA by 900 millions euros.

24 Joerges, Weimer (2012), p. 20.

25 Joerges, Weimer (2012) p. 15. See also Menéndez (2017).

26 The war on terror represents a good example in this regard.

context, effectiveness has become the main, if not the only, feature that anti-crisis measures must possess, even at the expenses of legality.

The new framework gives to EU institutions an unprecedented capacity to take part and influence decisions adopted by national authorities in domains reserved to Member States, as it reaches across the entire spectrum of the their economic and social policies. This is particularly evident with regard to States under financial assistance: structural adjustment programs give to EU institutions the capacity to exercise policy formulation, supervision and guidance on key social issues, such as the provision of social services or the regulation of the labour market.²⁷

Referring to the case of implicit conditionality, Sacchi described the situation as an “extreme case of vertical [...] integration in the policy arena, which goes well beyond what is generally meant by Europeanization, and cannot be captured through multilevel governance heuristic”. In his view, this transformation is better described as “a fusion ‘of responsibilities for the use of state instruments’”²⁸. In the same vein, the strengthening of economic policy coordination and surveillance mechanisms has potentially heightened the level of involvement of EU institutions into domestic policymaking. Chalmers, in particular, described the regimes aiming at securing balanced budgets, avoiding excessive deficits and avoiding or correcting macroeconomic imbalances as a process of co-government that “goes to the structure and rationale of a State fiscal and welfare systems”.²⁹

This development puts severe constraints on political bargaining processes that should take place at national level.³⁰ Indeed, in many cases national institutions – especially those of States under financial assistance – cannot but follow the line decided at supranational level, with little, if any, discretion.

3. The Impact of Anti-Crisis Measures on Social Rights

Reduction of social expenditure, modernization of social protection systems and reform of the labour market are ever-present ingredients in the recipes proposed in the menu of the EU anti-crisis strategy. These objectives are

²⁷ Costamagna (2012).

²⁸ Sacchi (2015), p. 89.

²⁹ See also Chalmers (2012).

³⁰ Floris de Witte (2013).

strongly reminiscent of those traditionally pursued by IMF-sponsored structural adjustment programmes back in the ‘80s and ‘90s, even though the IMF itself is now reconsidering the wisdom of this approach.³¹ Some commentators have aptly dubbed such a paradoxical situation as the “European rescue of the Washington Consensus”.³²

Especially from 2010 onward, the priority of austerity-driven rescue packages was reducing sovereign debts, by invariably imposing draconian cuts to social expenditure. The attention toward this issue may be explained by referring to its relative weight in European States’ budgets, as social expenditure account for roughly 30% of the total. At the same time, this strategy seems to be fully in line with one of the dominant narratives of the crisis, according to which the latter had been mainly generated by the profligacy of Southern States and the excessive generosity of their welfare systems.³³ This is very much evident in the case of States forced to enter into a structural adjustment programme in order to get financial assistance from the EU or from EU-related mechanisms. For instance, Greece and Hungary were forced to reduce their social expenditure by respectively 17% and 11% in the period 2007-2013³⁴. Moreover, it is worth observing that the First Economic Adjustment Programme for Greece envisaged cuts in health care expenditure amounting to more than 2 billion euro by 2015 and cuts in social benefits amounting to more than 5 billion euro by the same year to be achieved through, *inter alia*, a reduction of the monetary transfers to certain categories of vulnerable persons. In the third package approved in August 2015, Greek authorities committed to target savings of around 0.25% of GDP in 2015 and around 1% of GDP by 2016 to improve the long-term sustainability of the pension system.

A second component of the austerity-driven strategy is the promotion of internal devaluation, so to enable the ‘beneficiary’ State to regain external competitiveness. In a context where currency devaluation is no longer an option³⁵, the objective has been mostly pursued by reducing wages and other labour costs, making individual and collective dismissals easier, forcing Member States to revise (or even dismantle) the wage-setting system, by giving

31 Lütz (2015).

32 Lütz, Kranke (2010).

33 Tsoukala (2013).

34 OECD (2014).

35 Internal devaluation policies have been considered as “functional equivalents” to exchange rate flexibility. See generally Armigeon, Baccaro (2012).

precedence to individual over collective bargaining. This stems from the (belated) recognition that fiscal consolidation is not enough to promote growth and that there is the need to pursue it by mainly looking at the supply side.

Over the years, there have been some attempts to pay greater attention to the social implications of financial assistance programmes. Article 7 of Regulation (EU) 473/2013, on the strengthening of economic and budgetary surveillance of Member States in the euro area experiencing or threatened with serious difficulties with respect to their financial stability, represents a good example in this regard. The provision establishes that, when a Member State requests financial assistance, the draft macroeconomic adjustment programme has to take “into account the practice and institutions for wage formation and the national reform programme of the Member State concerned”, as well as to “fully observe Article 152 TFEU and Article 28 of the Charter”. Likewise, the August 2015 Memorandum for Greece seems, at least on paper, more ‘socially-conscious’ than its predecessors. In particular, it explicitly recognizes the need for greater social justice, urging the Greek Government to “roll out a basic social safety net in the form of a Guaranteed Minimum Income”³⁶ and praising the adoption of some measures aimed at supporting the most vulnerable part of the population.³⁷

Although certainly welcome, these attempts to work out a more balanced approach seem far too limited, especially if compared with the magnitude of the problem. Indeed, austerity measures contributed much to make the economic crisis evolve into a full-scale social crisis, having a severe negative impact on the enjoyment of a wide range of social rights, in particular with regard to certain groups, such as children, women, young and pensioners.

The impact of austerity measures on social rights has been the objective of several studies. Notably, in January 2015 the European Parliament published a detailed comparative analysis regarding the impact on fundamental rights of austerity measures imposed in response to the crisis by seven EU Member States: Belgium, Cyprus, Greece, Ireland, Italy, Spain and Portugal³⁸. The analysis focused on a number of rights protected by the EU Charter of Fundamental

36 *Memorandum of Understanding between the European Commission acting on behalf of the European Stability Mechanism and the Hellenic Republic and the Bank of Greece*, 19 August 2015, p. 4.

37 However, this praise sounds at bit paradoxical, as the adoption of these measures had been severely criticized by the donors at the time when they had been adopted.

38 European Parliament (2015).

Rights and by the European Social Charter, such as education, healthcare, work, pension, access to justice, freedom of expression and assembly, housing, property and some rights at work. The findings of the study paint a bleak picture.

For instance, with regard to the right to education, it found that reduction in the number of schools, in the number of teachers and of administrative and other school-related costs “include a danger to the overall quality of education and children’s success at school; an increase in unemployed workers in education; reduced availability of services [and] deterioration of general conditions in classrooms”. All these consequences being more intense for “[c]hildren with disabilities, Roma, Travellers’ children, as well as children of migrants”.³⁹ Furthermore, the study found that the massive reforms of the healthcare systems adopted in certain countries, such as Greece and Cyprus, primarily aimed at reducing costs through restricting access to healthcare, introducing or increasing participation fees, reducing salaries and freezing the employment of staff took an equally heavy toll on the enjoyment of the right to health. In particular these measures reduced access to healthcare, increased waiting times for treatments and unmet medical needs, as well as decreased preventive and protecting care. Also in this case, these effects were more acutely felt by the most vulnerable, such as poor and homeless people, older people, people with disabilities and their families, women, and undocumented migrants.⁴⁰ The analysis comes to similarly troublesome conclusions also with regard to other rights, such as work-related ones and, in particular, the right to collective bargaining; the right to social security, as social benefits have been cut and access has been severely restricted in many States; and the right to housing, as foreclosures and evictions escalated in countries such as Spain.⁴¹

4. The Court of Justice and the Safeguard of Social Rights in Crisis

4.1. The crisis, the reform of the European economic governance and the Court

At least on paper, the reform of the European economic governance strengthened the position of the Court.

³⁹ European Parliament (2015), p. 12.

⁴⁰ European Parliament (2015), p. 13.

⁴¹ European Parliament (2015), pp. 13-16.

On the one hand, new legal instruments, even if adopted outside the EU legal order, conferred further competences to the Court. This is the case of Article 37(3) ESM Treaty that gives to the Court the power to hear any dispute concerning the interpretation or the application of the Treaty. Furthermore, Article 8 TSCG empowers each Contracting Party to bring a claim before the Court when it considers that another Party failed to fully transpose, into its national legal order, the balanced budget rule, as provided for by Article 3(2) TSCG.⁴²

On the other hand, some commentators pointed out that the Court, together with some national supreme judicial bodies, has been very much involved in the fiscal domain, to a degree that is far higher than in the past and elsewhere. They considered that this has led to a level of judicial interference that is excessive, as decisions in this domain are better left with the political branches. They maintained that the main reason behind such an unprecedented judicial intervention in the fiscal domain is the recourse to international law instruments, which are more amenable to judicial review than EU ones.⁴³

However, the image of a stronger and pro-active Court can be hardly reconciled with the peripheral role that it has played with regard to the protection of social rights and, more generally, the safeguard of non-economic interests and values *vis-à-vis* the strengthening of the EMU.⁴⁴ This contrasts starkly with the key role that the Court played in the construction of the EU legal architecture underpinning the European integration process, through the introduction of new principles - such as that concerning the protection of fundamental rights - that have contributed much to shape the European integration process as a whole. Indeed, as aptly observed by Poiares Maduro, the CJEU “promoted the use of law as [...] a ‘mask for politics’ in European integration”, supplementing the work of the legislative process and compensating for the lack of consensus among Member States on key issues.⁴⁵ To this end, the CJEU did make full use of the interpretative discretion left by EU rules, stretching them to the limit and, in many instances, even beyond.

Conversely, in the cases concerning austerity measures the CJEU has keenly accepted the limits posed by EU law to its capacity to review the legal-

42 See generally Porchia (2013).

43 Fabbrini (2014).

44 The Court is not alone in holding this position: see Hinarejos (2016).

45 Poiares Maduro (1998), pp. 17-19.

ity of such measures. Most of these solutions are defensible,⁴⁶ resting upon a flawless, even though quite formalistic, reading of the relevant provisions. Nonetheless, the overall approach contrasts with the far more proactive attitude that it had adopted in the past, showing that the CJEU was not just unable to play a part, but, at least to a large extent, also unwilling to do so.

4.2. The systematic rejection of annulment actions brought by private applicants

The first line of relevant cases concerns the claims brought to the CJEU by private applicants seeking the annulment of acts addressed to a Member State in the context of a financial assistance programme.

A fitting example in this regard is the *Ledra* case,⁴⁷ concerning the ESM intervention to assist Cyprus in the management of the difficulties faced by two of its biggest banks and, consequently, to avoid contagion. ESM financial assistance, which lasted from 2013 to 2016, was granted on the back of a macro-economic adjustment programme set by a MoU to be negotiated between the Troika and the Cypriot authorities. Negotiations started in 2012 and ended in April 2013, when the MoU was signed by the Commission, on behalf of the ESM, the Central Bank of Cyprus and the Minister of Finance of Cyprus. In the meanwhile, the Cypriot authorities put the two largest Cypriot banks into resolution and provided for the recapitalisation of one of them, at the expenses of uninsured depositors, shareholders and bondholders. Some of them, after having seen a substantial decrease in the value of their deposits, turned to the EU General Court seeking the annulment of the parts of the MoU providing for the restructuring of the banks. In this case, the General Court⁴⁸ swiftly rejected the claim, pointing to the fact that the MoU had been adopted by the Republic of Cyprus and the ESM and, thus, not being an act of an EU institution, body, office or agency, its legality cannot be review under Article 263 TFEU.

The CJEU came to the same conclusion also in cases where the challenge

⁴⁶ Munari (2015), p. 49.

⁴⁷ Judgment of 20 September 2016, *Ledra Advertising at al.*, Joined cases C-8/15 to C-10/15 P, EU:C:2016:701.

⁴⁸ Order of 10 November 2014, *Ledra Advertising Ltd*, T-289/13, EU:T:2014:981, paras. 56-63.

was directed toward EU acts. In the *ADEDY* case,⁴⁹ for instance, a public sector trade union sought the annulment of two Council decisions addressed to Greece aiming at reinforcing and deepening fiscal surveillance, as well as pushing through measures for the reduction of an excessive deficit. Applicants argued that, *inter alia*, the two acts violated the principle of conferral, enshrined in Article 5(2) TEU. The General Court dismissed the action, as it considered that the applicants had no standing to bring it. Indeed, Article 263(4) TFUE provides that natural or legal persons can institute an annulment proceeding only in those cases where the act, if not addressed to them, is “of direct and individual concern to them”. The General Court focused exclusively on the requirement of direct concern and, having found that it had not been fulfilled and having considered that the two conditions are cumulative, it declared the action inadmissible without having to take into consideration the other one. In particular, it observed that the acts not only were addressed to Greece, but were also very general in content, leaving much discretionary space to Greek authorities as to the selection of the concrete measures to be adopted in order to reduce the deficit. Therefore, applicants were not in the position to claim that the EU decisions were of direct concern to them.

This conclusion is in line with a well-settled case law and it did not come as a surprise. The same goes also with a final remark made by the Court, dismissing the incompatibility between the inadmissibility decision and the right to effective judicial protection. Following, also in this case, a usual path,⁵⁰ the Court pointed out that the remedy provided for under Article 263(4) TFUE is not to be considered in isolation, as it represents just one of the possibilities available to private parties to challenge the validity of EU acts having a general character. Indeed, private parties can bring their claim in front of national courts and, then, ask them to make a reference to the CJEU for a preliminary

49 Order of 27 November 2011, *Anotati Dioikisi Enoseon Dimosion Ypallilon (ADEDY)*, *Spyridon Papaspyros and Ilias Iliopoulos v Council of the European Union*, T-15/11, EU:T:2012:627.

50 However this line of reasoning has been much contested also within the CJEU, as the strict interpretation of the conditions for admissibility of action brought by private applicants were considered to be incompatible with the right to an effective judicial remedy: see Judgment of 3 May 2002, *Jego-Quéré*, T-177/01, EU:T:2002:112. The judgment was subsequently set aside by the Court, which considered that the then Court of First Instance erred in law, as it failed to duly consider that “the Treaty has established a complete system of legal remedies and procedures designed to ensure review of the legality of acts of the institutions” (Judgment of 1 April 2004, *Jego-Quéré*, C-263/02, EU:C:2004:210).

ruling on the validity of the contested acts. As confirmed in *ADEDY*, the annulment procedure and the preliminary reference one establish “a complete system of legal remedies and procedures designed to enable the European Union Courts to review the legality of acts of the institutions”

4.3. *A truly “complete system of legal remedies”? Austerity measures outside the reach of the Charter*

The application of the ‘complete system’ doctrine does not seem to offer many reasons for hope with regard to the capacity of the Court to play a more active role for the protection of rights threatened by austerity measures. Indeed, the CJEU has rejected most of the requests for preliminary rulings submitted by national courts, showing, in particular, much reluctance to apply the EU Charter on Fundamental Rights (‘the Charter’) in cases concerning anti-crisis measures.

In this regard, the case that set the tone was *Pringle*,⁵¹ one of the few decided by the Court sitting in plenary session. The case originated from a referral by the Irish High Court, which had been asked to ascertain whether, by ratifying the ESM Treaty, Ireland would have undertaken obligations in contravention with several provisions of EU law and, in particular, with the norms on the protection of fundamental rights, as contained in the Charter. The Court answered in the negative, observing that in the case at hand the Charter does not find application. According to Article 51 of the Charter, its provisions are addressed to Member States only when they are implementing EU law and, according to the Court, this condition was not fulfilled in the case at stake. Indeed, “Member States are not implementing Union law [...] when they establish a stability mechanism such as the ESM where [...] the EU and FEU Treaties do not confer any specific competence on the Union to establish such a mechanism”.⁵² Regrettably, the Court did not conclusively address the other issue on the table, i.e. whether the Charter applies when EU institutions, such as the Commission and the European Central Bank, act outside the EU legal framework, as it happens, for instance, when they participate to the definitions of the conditions attached to ESM-sponsored assistance packages. In this regard, it is worth considering that, in her conclusions on the case, Advocate General Kokott made clear that the Commission “as such

⁵¹ Judgment of 27 November 2012, *Pringle*, C-370/12, EU:C:2012:756.

⁵² *Pringle* above note 50, para. 180.

is bound by the full extent of European Union law, including the Charter of Fundamental Rights”.⁵³

The CJEU adopted an equally restrictive stance with regard to the applicability of the Charter in cases directly concerning the legality of austerity measures. A good example in this regard is the Order adopted by the Court in *Sindicato dos Bancarios do Norte and Others*.⁵⁴ The case concerned the Portuguese bailout and, in particular, a number of measures aimed, as clarified in the Implementing Decision 2011/344/EU,⁵⁵ at “strengthening labour market functioning by limiting severance payments and making working time arrangements more flexible” by the end of 2011, as provided for by the Memorandum of Understanding. The Portuguese Government honoured its commitments with the Budget Law for 2011, which imposed, *inter alia*, cuts to public sector wages and suspended the payment of bonuses. Public sectors trade unions challenged these measures in front of the employment tribunal of Porto that, in turn, referred a number of preliminary questions to the Court. In particular, it asked whether the right to fair and just working conditions, as enshrined in Article 31 of the Charter, prevented the reduction of workers’ salary, when there is no modification of the collective agreement. Moreover, the Portuguese tribunal also asked whether the same provision is to be interpreted as imposing a remuneration that allows the worker to maintain a satisfactory standard of living. Lastly, it asked whether salary cuts, insofar as they are not the only available measure to ensure the sustainability of public finances, contravene Article 31 of the Charter, as they put at risk the standard of living of the affected workers. The Court refused to hear any of these questions, claiming that it had no jurisdiction to take cognisance of the requests. Indeed, it confirmed that the Charter does not find application in this case, since, when Portugal adopted the contested measures, it was not implementing EU law.

The strict interpretation of the conditions regulating the applicability of the Charter seems compatible with the black letter of Article 51 of the Charter, which establishes that the Charter applies to member States “only when they

⁵³ View of 26 October 2012, *Pringle*, C-370/12, EU:C:2012:675, para. 176. See Kilpatrick (2015a), pp. 405-406.

⁵⁴ Order of 7 March 2013, *Sindicato dos Bancarios do Norte and Others*, C-128/12, EU:C:2013:149.

⁵⁵ Council Implementing Decision no. 2011/344/EU of 30 May 2011 on granting Union financial assistance to Portugal [2011] OJ L159/88.

are implementing Union law”. However, there has been instances where the Court opted for a much liberal reading of the provision, allowing for the application of the Charter in cases where the State concerned was not implementing EU law. A case that stands out in this regard is Åkerberg Fransson, a judgment concerning an alleged violation of the *ne bis in idem* principle enshrined in Article 50 of the Charter.⁵⁶ Mr. Fransson, having been charged for serious tax offences, had first been ordered to pay a hefty tax surcharge by the Swedish Tax Board and, then, criminally prosecuted for these very offences. From our perspective, the most interesting issue is that neither the Tax Board, nor the Prosecutor were implementing EU law when they imposed the penalties on Mr. Fransson or when they decided to prosecute him. This notwithstanding, the Court established that the Charter could find application in the case at hand, as it considered that the existence of a link, even though quite tenuous, between the offences committed by Mr Fransson and EU law would suffice to this end. In particular, the Court pointed to the fact that some of these breaches concerned the obligation to declare VAT, which, in turn, is one of the sources of EU’s own resources and it regulated by EU primary and secondary norms. This element, according to the Court, was enough to draw the situation under the scope of EU law and, thus, to make the Charter applicable. This broad reading of the conditions governing the application of EU fundamental rights norms refers back to case law predating the entry into force of the Charter and it used by the CJEU to broaden its scope of application vis-à-vis Member States.

Had the Court followed the same interpretive approach when faced with challenges directed against austerity measures, it would have come to different conclusions as to the applicability of the Charter. Indeed, the measures at stake had been adopted in the context of structural adjustment programs negotiated with EU institutions, in accordance to procedures governed by EU law and to pursue objectives, such as the reduction of the excessive deficits, sanctioned by EU norms. In a word, they clearly have a much stronger link with the EU legal order than those in Åkerberg Fransson.

4.4. *The ‘complete system’ doctrine avenged? Yes, but only partially*

As seen above, the Court went through a long period in which it seemed to fully adhere to the idea that bailout measures were immune from judicial scrutiny at supranational level. However, there are now some tentative signs

⁵⁶ See Lazzarini (2013); Montaldo (2013), pp. 574-581.

pointing in the opposite direction, showing a renewed commitment toward opening up new judicial avenues for the protection of fundamental rights in times of austerity.

The most recent example in this regard is the *Florescu* judgment of June 2017. The case concerned a Romanian law of 2009 that prohibited the combining of a pension with an income for activities carried out in a public institution. Anyone in such position had to either ask for the suspension of the pension or renounce to the paid job. The law had been adopted in order to fulfil the obligations arising under the MoU negotiated by the Romanian Government with the Commission as a condition to obtain financial assistance from the EU. Three retired judges, teaching at the law faculty of Sibiu, challenged the measure, which, in their view, violated several of their rights, as enshrined in the Charter. The Court of Appeal decided to stay proceedings and raise a number of preliminary questions. Quite remarkably, the Court has already had the chance to rule on similar measures adopted by Romanian authorities on the basis of the very same law. However, in 2011 and 2012 it dismissed two requests coming from Romanian judges, finding “an easy escape route”⁵⁷ in poorly drafted orders for reference that failed to highlight the connection between national measures and EU law. In *Florescu*, the Court took a different path, declaring its competence to rule on the compatibility between Romanian austerity measures and EU law provisions protecting fundamental rights. To this end, it found that the MoU is reviewable under Article 267 TFEU, since it is mandatory and “constitutes an act of an EU institution”.⁵⁸ This is quite remarkable, being it the first time, nine years after the first financial assistance programme was launched, in which the Court take a clear position on this issue. Yet, the implications of this finding need to be assessed against the specificities of the Romania’s assistance programme. Indeed, the latter was based on Article 143 TFEU, which empowers the EU to financially assist non-euro States facing difficulties as regards their balance of payments. This means that the MoU at issue finds its roots in EU law, having being adopted on the basis of Article 143 TFEU and Regulation (EC) No. 332/2002.⁵⁹ In the light of the above, the Court had an easy run in finding that the Charter

⁵⁷ Barnard (2013).

⁵⁸ Judgment of 13 June 2017, *Florescu*, C-258/14, EU:C:2017:448, para. 35.

⁵⁹ Council Regulation (EC) No. 332/2002 of 18 February 2012 *establishing a facility providing medium-term financial assistance for Member States’ balances of payments*, OJ L 53 of 23.02.2012, pp. 1-3.

was applicable to the case at hand, by pointing to the fact that Romanian authorities were implementing EU law when adopting measures that aimed at realizing the objectives set forth in the MoU. In the process, the Court excluded, by correctly referring to its previous case-law, that the existence of a margin of discretion for national authorities in deciding what measures were to be adopted could in any way call into question this analysis.⁶⁰

What remains to be seen is whether *Florescu* is a sign of a broader change of attitude by the Court or if the latter will stick to its strict interpretative approach when it comes to deciding on the applicability of the Charter in cases where bailout conditions are set by documents whose main legal basis lies outside the EU legal framework. The Court will be called upon to provide an answer to this question in a pending case concerning the reduction of the salaries of Portuguese Court of Auditors' judges. The reduction resulted from a law adopted in 2014 that scaled down the remuneration of many categories of public servants, so to fulfil one of the conditions contained in the structural adjustment programme negotiated with the Troika. In the national proceeding, claimants sought the annulment of the measure, arguing that it contrasted with the principle of judicial independence, as enshrined in the TEU and in Article 47 of the Charter. The referring judge – the *Supremo Tribunal Administrativo* – decided to turn to the Court, asking whether these EU provisions have to be interpreted in the sense of precluding the adoption of measures such as the contested one. In his Opinion, AG Saugmandsgaard Øe⁶¹ concluded that the Portuguese measure “constitutes an implementation of provisions of EU law, within the meaning of Article 51 of the Charter”.⁶² The conclusion seems to rest on the existence of a sufficiently strong linkage between the contested measures and the EU legal order. In particular, the AG posited, without spelling it out clearly, that the reduction of salaries constituted a measure adopted to comply with conditions referred to also in EU legal acts, such as Council implementing decisions. Doubts can be legitimately raised as to whether the Opinion will be able to persuade the Court to revisit its position on the applicability of the Charter to this type of bailout measures. Indeed, the AG was too swift in addressing this controversial aspect, jumping directly to the conclusion and failing to clearly articulate all the steps of his argumentative path.

⁶⁰ *Florescu* above note 57, Para. 48.

⁶¹ Opinion of AG Saugmandsgaard Øe of 18 May 2017, *Associação Sindical dos Juizes Portugueses*, C-64/16.

⁶² *ASJP* above note 60, Para. 53.

It is worth highlighting that the Court had already opened up another judicial avenue for the protection of fundamental rights in non-EU based structural adjustment programmes. In the above-mentioned *Ledra* judgment, the Court of Justice declared the admissibility of an action for damages brought by a number of Cypriot investors against the Commission and the ECB for their role in the negotiation and conclusion of the MoU. As seen above, the latter document detailed a series of measures to be adopted by Cypriot authorities as a condition to obtain financial assistance by the ESM. In particular, applicants claimed that the Commission and the ECB played a key role in devising the bail-in implemented by Cypriot authorities in a way that made their bank deposits' value drop dramatically and, thus, violating their right to property as enshrined in Article 17 of the Charter. On this point, the Court overturned the decision of the General Court and distanced itself from the path suggested by Advocate General Wahl.

The General Court, in an Order issued on November 2014, rejected the claims for compensation on several different grounds. First, it found that there was no act, nor course of action, that could be imputed to the Commission or the ECB, since the ESM Treaty does not confer to them any power to take autonomous decisions. Consequently, the acts adopted in that context "solely commit the ESM"⁶³ and the Court has no jurisdiction to consider a claim that is based on the illegality of an act that does not originate from a EU institution acting within the EU. Secondly, it excluded that the Commission could incur responsibility for having failed to fully exercise its role as guardian of the Treaties, as provided for in Article 17 TEU. In particular, it opined that the alleged omission did not meet one of the conditions for the admissibility of the action for damages, that of the existence of a causal link between the behaviour of the institution and the damage. Indeed, the decree that determined the severe reduction of the value of claimants' deposits was adopted before the conclusion of the MoU and, consequently, the Commission could have done nothing to avert the losses.⁶⁴

The Advocate General's Opinion⁶⁵ was, up to a certain point, broadly in line with the arguments put forward by the General Court. After excluding that the MoU could be directly imputed to either the Commission or the ECB,

⁶³ *Ledra* above note 47, para. 45.

⁶⁴ *Ledra* above note 47, paras. 54-55.

⁶⁵ Opinion of 21 April 2016, *Ledra Advertsing Ltd*, Joined cases C-8/15 P to C-10/15 P, EU:C:2016:701.

he offered a distinctively restrictive reading of *Pringle* and, in particular, of the paragraph where the Court hinted at the existence of an obligation for the Commission to ensure the consistency of the MoU with EU law.⁶⁶ Further he drew an unpersuasive parallel between the discretionality that the Commission enjoy in the context of the infringement procedure and the situation at stake, going as far as maintaining that “it cannot be argued that every time the Commission breaches a specific Treaty provision, or does not prevent such a provision being breached by another entity, that breach amounts to an infringement of the general provision of Article 17 TEU”. All these elements led him to conclude that there was no duty for the Commission to act in case of incompatibility between bailout instruments and EU law and, thus, no responsibility could arise. For good measure, the Advocate General also excluded the applicability of the Charter when the Commission acts outside the EU legal framework. In his final remarks, AG Wahl admitted that aggrieved individuals should not look for remedies within the EU legal order, but at national or international level. As for the latter, he took the UN Draft Articles on the Responsibility of International Organizations as a “source of inspiration”⁶⁷ to conclude that only the ESM, and possibly Member States, can be held responsible for the acts adopted in the context of ESM-sponsored financial assistance programmes.

Conversely, the Court of Justice declared the action for damages admissible, at least with regard to the Commission. The fact that the MoU falls outside the scope of application of EU law – the Court observed – does not bar applicants from bringing an action for compensation. Indeed, this element is relevant for the admissibility of an action for annulment, but not in the case at stake. The two actions are autonomous⁶⁸ and their admissibility depends on the fulfilment of different conditions. Subsequently, the Court turned to address the crux of the matter, i.e. whether the Commission is bound to ensure the respect of EU law even when acting outside the EU legal order. *Pringle* had been quite reticent on this point, carefully avoiding to draw any conclusion. *Ledra* represents a step forward in that regard: moving from the

⁶⁶ *Pringle* above n. 50, Para. 164.

⁶⁷ *Pringle* above note 50, Para. 100. Quite remarkably, in drawing inspiration from this document, the Advocate General did not even feel the need to distinguish between international responsibility, which is the subject matter of DARIO, and non-contractual liability under Art. 340 TFEU.

⁶⁸ See Gutman (2011), pp. 703-708.

premise that the participation to the ESM activities cannot alter the powers conferred to the institution by the Treaties, the Court inferred that “the Commission retains, [...] within the framework of the ESM Treaty, its role of guardian of the Treaties as resulting from article 17(1) TEU”. For this reason, it is bound to “refrain from signing a memorandum of understanding” even in the case “it doubts” its consistency with EU law.

Such a conclusion rests on the assumption that the primacy of EU law operates not only with regard to domestic law, but also with regard to agreements concluded between Member States.⁶⁹ What the Court is saying, without making it explicit, is that Article 17 TEU, mandating the Commission to act as guardian of the Treaties, prevails over Article 13(4) ESM Treaty, which establishes that the “Commission shall sign the MoU on behalf of the ESM” when the document is approved by the Board of Governors. In this regard, the Court is seemingly sending a strong message to EU institutions or, at least, to the Commission, making it clear that their freedom of action in the context of intergovernmental mechanism created by Member States is not unlimited.

These judgments and opinions represent a step forward, signalling the Court’s renewed commitment toward the protection of fundamental rights in the context of structural adjustment programmes. However, the sense of relief may well evaporate if one considers how the cases have been decided on the merit. Both in *Florescu* and *Ledra* the Court found against the private claimants, excluding that any violation of the rights had occurred. These conclusions are by and large convincing in the light of the factual scenarios: indeed, in both cases the impugned measures touched upon privileges, more than rights. Far more problematic is the argumentative path followed to get there, especially if the Court is going follow it also in the future, when dealing with other types of measures. In both these cases, the Court adopted an extremely deferential standard of review in applying the proportionality test, granting to national authorities an extremely wide margin of appreciation.

In *Ledra*, the Court began with making clear that, even when acting in the context of the ESM Treaty, the Commission had to ensure that the MoU was consistent with the rights guaranteed therein and, in particular, with the right to property, contained in Article 17. Subsequently, it observed that, under the Charter, this right is not absolute, as it can be subject to restrictions. How-

⁶⁹ This proposition is fully in line with the case law of the Court; see Judgment of 10 November 1992, *Exportur SA*, C-3/91, EU:C:1992:420. Furthermore, it finds strong support in the literature, see Bruno de Witte (2001), pp. 244-245.

ever, Article 52(1) Charter establishes that limitations to the exercise of any right are possible only in so far as they pursue an objective of general interest, comply with the principle of proportionality and does not impair the essence of the right. The Court enumerated all the conditions, but it then contented itself with just one of them, i.e. the fact the impugned measures pursued an objective of general interest. Little, if any, attention is devoted to their proportionality and to their capacity to preserve the essence of the right. The importance of the objective pursued by the measures – ensuring the stability of the banking system and of the euro area as a whole – it is enough, in the eyes of the Court, to conclude that they “do not constitute a disproportionate and intolerable interference impairing the very essence of the appellants’ right to property”. Without any need to consider the suitability of the measures to reach the stated objectives, their necessity or whether a fair balance had been struck with other competing objectives.⁷⁰

Likewise, in *Florescu* the Court found that the contested measure did not violate claimants’ right to property, since it “is capable of attaining the general interest objective pursued and is necessary to attain that objective”. To this end, it acknowledged that national authorities enjoy a wide margin of appreciation “when adopting economic decisions”, being them “in the best position to determine the measures likely to achieve the objective pursued”.⁷¹ Such a highly deferential approach is at the vanishing point of judicial scrutiny, putting the Court in the spectators’ seat while national authorities are free to run the show at their will. What justifies the granting of a wide margin is “the particular economic context” that needs to be confronted by “reducing public sector wage costs and [...] reforming the pension system”.⁷² The Court seemed, thus, to share the sense of inevitability that traditionally pervades the adoption of austerity measures and that represents a defining trait of the technocratic approach prevailing in this context. In other words, this approach can be read as offering a stark – and troublesome – confirmation of the deep impact of the crisis on the EU constitutional fabric and, in particular, on the relationship between different objectives therein. Ensuring the finan-

70 The Court seems to have taken very seriously, even too much, the suggestion of some commentators who argue that, instead than putting these measures outside the reach of EU law, the Court should address the merit of the cases, granting a wide margin of discretion to decision-makers in order to preserve their autonomy of action. See Barnard (2013), pp. 13-14.

71 *Florescu* above note 57, para. 57.

72 *Florescu* above note 57, paras 56-57.

cial stability of the euro area has seemingly become a sort of a trump card that just needs to be invoked in order to prevail over any other competing objective.⁷³

5. Concluding remarks

The analysis shows that the Court has consistently adopted a non-interventionist stance with regard to judicial actions challenging the compatibility of austerity measures with key principles of EU law, such as the protection of fundamental rights. This finding still holds true after the *Ledra* and *Florescu* judgments, where the Court finally declared the amenability of bailout measures to some form of judicial control at supranational level, but it then adopted an extremely deferential approach toward the choice made by national authorities.

This choice can be viewed as an attempt by the Court not to interfere with decisions taken by political bodies – being them national or supranational ones – to cope with an emergency situation. This is nothing new, as there are many examples where courts have decided to refrain from constraining the capacity of the legislative or, more often, executive power to (re-)act in the face of an emergency.⁷⁴

However, the adoption of this approach by the Court is problematic under many accounts. In particular, the choice not to engage with these issues reveals its passive acceptance of the demise of the role that the law can play in the response to the crisis and the construction of a new architecture.⁷⁵ This is all the more disturbing in the context of the European Union that, as the Court itself has proudly repeated several time and it has been codified in the Preamble of the Charter, is “based on the rule of law”. The situation is further compounded by the effects that the managerialist turn, and its blind adherence to fiscal austerity, is having on what can be broadly defined as the ‘European social model’. In this context, the Court’s unwillingness – and not just inability – to fully exercise its role do not certainly do any good in restoring the legitimacy of the European integration process.

⁷³ See generally Costamagna (2014), pp. 371-373.

⁷⁴ This tendency has been extensively analysed with regard to the so-called fight against terrorism, see recently Fabbrini (2010); Cole (2003).

⁷⁵ Giubboni (2015).

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RIPENSARE LA NAZIONE OTTOCENTESCA.
VECCHI E NUOVI PARADIGMI TRA STORIA, DIRITTO E GLOBALITÀ

Eliana Augusti

«[...] l'età del simultaneo, della giustapposizione, del vicino e del lontano, del fianco a fianco e del disperso»

(M. Foucault, *Spazi altri. I principi dell'eterotopia*, 1985-86)

1. L'invenzione della nazione: percorsi mitici, mistici e utopici

Nel 1851, durante la celebre prolusione con cui inaugurava il corso di diritto internazionale e marittimo della Regia Università di Torino, Pasquale Stanislao Mancini sovvertiva i punti saldi della disciplina, immaginando nella nazione il nuovo ideale al quale ridurre il dialogo tra soggetti di diritto internazionale¹. A suo dire, nessuna aggregazione territoriale, nessuna società naturale di uomini avrebbe trovato altro fondamento politico se non nella nazionalità. Nessun patto, nessun contratto sociale: l'unità nazionale non implicava un'unità statale, per quanto le due aspirazioni (nazionale e statale) potessero coincidere nel percorso di edificazione di uno stato nazionale. Essa era unità profonda che precedeva lo Stato e che derivava da caratteri comuni: la lingua, la religione, l'etnia, il suolo. La giuridicità era nella «coscienza di una comune nazionalità» e si manifestava, all'interno, nella «libera costituzione della nazione» e, all'esterno, nella «indipendente autonomia verso le nazioni straniere»². La coscienza di essere parte di una nazione legittimava di per sé l'esercizio della sovranità statale nei confronti dei cittadini. Lo Stato naturalmente perfetto di una nazione era l'*etnicarchia*, che richiedeva: un controllo su tutto il territorio nazionale così come risultato dei suoi confini naturali; l'esistenza di un governo in grado di governare; una posizione di uguaglianza con le altre nazioni straniere³.

1 Mancini (1851), p. 7. Diffusamente in Nuzzo (2007), pp. 161-186. Per un profilo di Mancini, vedi Nuzzo (2012b), pp. 307-310; Storti (2013), vol. II, pp. 1244-1248.

2 Nuzzo (2007), pp. 165-166.

3 Mancini (1851), pp. 39-42.

A parlare per primo di *etnicarchia* era stato Giandomenico Romagnosi⁴. Anzi, fu lui a coniare nell'ambito della nuova dottrina della nazionalità il neologismo, frutto, a sua volta, dell'interiorizzazione del pensiero vichiano. L'*etnicarchia* altro non era che il diritto di un'etnia al controllo pieno sul proprio territorio. Lo aveva stigmatizzato Jean-Étienne-Marie Portalis nel 1803: la nazione era un *factum* e non un *pactum*, un prodotto della storia⁵. Questo nonostante, ancora, agli inizi dell'Ottocento le nazioni non avessero una "storia": anche quelle che avevano già identificato i loro antenati, infatti, «disponevano solo di pochi capitoli incompleti di una narrazione di cui resta[va] ancora da scrivere l'essenziale»⁶.

Al di là del soggetto *etnicarchico*, proiezione sovrana dell'etnia, restava la nazione il vero protagonista delle relazioni internazionali, la «monade razionale»⁷, scriveva Mancini, forse tenendo a mente quell'idea di nazione che correva oltralpe di cosa «una e indivisibile»⁸. Per quanto però «una e indivisibile», per quanto fatto di natura, per quanto eredità di caratteri comuni da accogliere, «inventariare» e trasmettere, la nazione restava cosa da «inventare». Il processo di invenzione, e costruzione, non fu però un processo privato, non fu un affare di famiglia, di «etnia», nazionale. Come ha colto efficacemente Anne-Marie Thiesse nel 2001, a partire dal Settecento, ogni singolo gruppo nazionale si era mostrato «recettivo», attento a quanto facevano i suoi simili e i suoi rivali, aveva cercato di adattare alle proprie esigenze le idee degli altri ed era stato, a sua volta, imitato quando aveva scoperto qualcosa di nuovo o in grado di migliorare la sua condizione. Le origini della nazione, dunque, apparivano paradossalmente transnazionali⁹, il processo creativo della nazione

4 Cf. Manfredi (1961), pp. 463-470. «Etnicarchia» compare in Astuti (1937). Vedi anche Scioscioli (1995), p. 143; Lacché (2010), pp. 153-228.

5 Guiomar (1990), pp. 102-112.

6 Thiesse (2001), p.127. Solo alla fine del secolo sarebbero state in possesso di «un racconto continuo che mostra[va] la lunga strada percorsa, il cui senso, nonostante tutte le vicissitudini e gli ostacoli, [era] dato dal genio nazionale: storia compiuta se la nazione [aveva] raggiunto l'indipendenza, storia che preannuncia[va] un radioso avvenire se la lotta per la libertà [era] ancora tutta da combattere».

7 Mancini (1851), pp. 46-47. Cf. Pene Vidari (2013), pp. 117-134; Passero (2010), pp. 93-100.

8 Rossi (1866-67), vol I, pp. 244 e ss., lo affermò con forza, esaltando il significato politico e il valore esemplare del modello d'oltralpe. Cf. Ghisalberti (2015); Treggiari (1991), vol I, pp. 273-297.

9 Thiesse (2001), pp. 8-9.

nasceva come processo pubblico e partecipato. «Building Nations», scriverà Eric Hobsbawm, usando non a caso una forma impersonale¹⁰. Politica transnazionale, internazionale e interna sembravano essere strettamente legate le une alle altre dal vincolo del principio di nazionalità, permeante e diffusivo.

Non stupisce, quindi, l'intuizione di Giuseppe Mazzini, che aspirava, attraverso la nazione, al progresso dell'umanità intera, per quanto la sua umanità fosse ancora ed essenzialmente l'Europa. L'umanità poteva ridursi alla nazione; attraverso la nazione era possibile immaginare l'umanità; attraverso la nazione l'umanità aveva l'occasione di migliorarsi e raggiungere il bene comune. Nel saggio del 1847 su *Nazionalità e cosmopolitismo*, all'indomani della costituita *Lega Internazionale dei Popoli* a Londra, Mazzini così rispondeva alle accuse che gli venivano mosse dai cosmopoliti, per i quali "nazione" era concetto «retrogrado e pericoloso»: «noi siamo tutti Cosmopoliti, se per Cosmopolitismo s'intende la fratellanza di tutti, l'amore per tutti, e la distruzione delle barriere che separano i popoli, dando loro interessi opposti»¹¹. In questo modo, Mazzini superava il pregiudizio settecentesco del popolo-nazione come macro-stirpe mistica di consanguinei, come comunità che si prolungava attraverso le epoche grazie a «un patto non solo tra chi è in vita oggi, ma tra i vivi, i morti e i non ancora nati»¹²; come «comunità sublime di una lunga catena di generazioni passate, attualmente viventi e ancora da venire, le quali sono tutte unite per la vita e per la morte in una grande e solida associazione»¹³; come accampamento armato pronto alla guerra contro «eterni nemici» che stanno fuori e dentro il recinto¹⁴. La nazione di Mazzini apriva alla fratellanza, all'umanità e al suo progresso. Il principio che avrebbe dovuto reggere ogni diritto pubblico o internazionale per Mazzini era «il miglioramento di tutti per mezzo di tutti; il progresso di ciascuno a vantaggio di tutti»¹⁵. Come? Passando per la nazione: condizione «indispensabile del moto progressivo dell'epoca» era il «ritemperare» la nazionalità dei popoli nei popoli. «L'Umanità è il fine: la Nazione, il mezzo»¹⁶, scriveva. Il minimo co-

10 Hobsbawm (2010), p. 101, compare come «Si costruiscono nazioni».

11 *Nazionalità e cosmopolitismo* (1847), in Mazzini (2011), p. 83.

12 Burke (1790), p. 144.

13 Müller (1989), p. 102. Cf. Merker (2009), p. 22.

14 La comunità "mistica" non avrebbe potuto tollerare dissidenti ed estranei al suo interno e nella guerra verso chi stava fuori, i popoli avrebbero imparato a «conoscere e contemplare se stessi», Müller (1989), pp. 29-32. Cf. Merker (2009), p. 23.

15 *Nazionalità e cosmopolitismo* (1847), in Mazzini (2011), p. 87.

16 *Nazionalismo e nazionalità* (1871), in Mazzini (2011), p. 89. Anche per Mancini il

mune denominatore del progresso era nella nazione: non un valore esclusivo, ma condiviso, lingua comune per trovare l'accordo, via da percorrere insieme agli altri¹⁷. Come componenti spettrali con diverse lunghezze d'onda, come fasci cromatici attraverso un prisma, le nazionalità avevano un'origine, una legge e uno scopo comune, derivavano tutte dallo stesso raggio di luce. Erano dispersione di un'umanità di cui non avevano più memoria e alla quale dovevano tendere.

«Non crediamo all'eternità delle razze. Non crediamo all'eternità delle lingue. Non crediamo all'eternità e all'onnipotente influenza dei climi sullo sviluppo dell'attività umanitaria [...] Crediamo a una sola e costante legge generale [...] Crediamo che il lavoro di tutte queste facoltà, sviluppate e convertite in forze attive, giungerà a fondere tutti i membri dell'Umanità nella coscienza d'una origine, d'una legge di moto e d'uno scopo comune».

Più che una risposta “in concreto”, però, quella di Mazzini era una risposta “in fede”, un atto di fede, meglio, nella fratellanza umana¹⁸. In un altro scritto, sempre del 1847, chiariva e consolidava la sua intuizione:

«Non siamo forse tutti, nazioni ed individui, creature di Dio, obbligate a fare il bene, a frenare il male, a favorire il Suo disegno, ad ottenere il trionfo della verità sull'errore, della libertà sulla schiavitù? I doveri delle nazioni non crescono forse con la loro forza? L'indifferenza non è forse ateismo? [...] Quando Iddio pone sulla terra un popolo e gli dice: «Sii una nazione!» Egli non dice: «Isolati [...]», egli dice: «Cammina con la testa alta in mezzo ai fratelli che Io ti ho dato [...]»: prendi il tuo posto fra le nazioni [...]. Dichiarati apertamente la Fede dinanzi al mondo ed ai padroni del mondo, non rinnegare i tuoi fratelli, ma aiutali, secondo i loro bisogni e il tuo potere»¹⁹.

fine supremo da raggiungere era quello dell'*Umanità delle Nazioni*, meglio espresso nella «celebrazione dell'umanità e [nel] suo progresso civile nel libero, armonico e compiuto sviluppo delle Nazionalità». Così in Chabod (1961), p. 81. Sugli esiti dell'idea di “nazione” nella cultura giuridica italiana tra Otto e Novecento vedi Colao (2001), pp. 255-360.

17 Lo avrebbe chiarito anche Gaetano Filangieri: questa tensione all'umanità era necessaria, ma solo nella salvaguardia della propria specificità nazionale. «Spogliandoci di ogni prevenzione, investendoci di quel sano carattere d'imparzialità, che le ricerche politiche esigono, noi troveremo l'interesse privato di ciascheduna nazione così strettamente unito all'interesse universale e viceversa l'interesse universale così strettamente unito al particolare, che da una nazione non può perdere, senza che le altre perdano, e che non può guadagnare senza che le altre guadagnino». Filangieri (1784), pp. 53-54.

18 *Umanità e patria* (1836), in Mazzini (2011), pp. 78-80.

19 *La Lega Internazionale dei Popoli* (1847), in Mazzini (2011), pp. 261-262.

«Sii una nazione! [...] prendi il tuo posto fra le nazioni». Era la consacrazione del principio di autodeterminazione dei popoli davanti a Dio, «ai padroni del mondo» e «ai fratelli». Se il progetto-nazione era un passo obbligato e provvidenzialmente segnato, se la neutralità e l'indifferenza dei «fratelli» era immorale e, dunque, la solidarietà un dovere, la «nazione» assumeva connotazioni misticheggianti e permetteva di sfumare nel metafisico ogni ulteriore argomentazione, annientando anche le insinuazioni della macchinazione borghese e capitalistica che intorno alla nazione aleggiavano²⁰.

Nel Settecento gli avversari della rivoluzione avevano auspicato il ritorno a un popolo depoliticizzato, «di dimensione morfologica, localistica, medievalemente premoderno»²¹, costretto al «doppio gioco della Chiesa e dello Stato» per ripensarsi come essere collettivo²². Ora, nell'Ottocento, la nazione si prestava a strumento di riscatto, fornendo al popolo un'occasione di emancipazione e progresso. Federico Chabod lo avrebbe chiarito negli anni Sessanta del secolo scorso. Nell'Ottocento si abilitava il ruolo dell'opinione pubblica, si avvertiva la necessità di eccitarla, addirittura, attraverso la stampa, di «scalda[n]e» le passioni nazionali e farne un'arma nella disputa diplomatica²³. Per ottenere lo scopo, bisognava però toccare le corde giuste. La politica, rivelava Chabod, «acquista[va] *pathos* religioso»: la nazione diventava *patria*, la patria diveniva «la nuova divinità del mondo moderno»²⁴ e il progetto nazionalistico finiva inevitabilmente col condividere il linguaggio della cristianità²⁵.

E di linguaggio della cristianità si trattava anche in contesti per così dire più «ufficiali». Il 15 novembre 1818, ad Aix-la-Chapelle, nell'intento di rinsaldare il principio secentesco d'intima unione posto già a presidio dei rapporti e degli interessi comuni in Europa, l'unione degli Stati aveva riconosciuto la sua indissolubilità proprio in quel legame di «fraternité chrétienne» che i sovrani europei avevano creato tra loro, e che avrebbero garantito nel mantenimento della «paix générale»²⁶. Ad Aix-la-Chapelle si proclamava la fratel-

20 Cf. Barthalay (1976), p.1; Wallerstein (2013).

21 Merker (2009), p. 21.

22 De Maistre (1884-87), vol. I, pp. 309-554, (p. 376), citato in Merker (2009), p. 21.

23 Chabod (1961), p. 60.

24 Chabod (1961), p. 61. Così anche Padoa Schioppa (2002), pp. 62-63.

25 Per Smith (2000), p. 16, come per Benedict Anderson, «il nazionalismo è molto più vicino alla religione e alle comunità religiose che, ad esempio, al liberalismo o al socialismo». Vedi anche Gellner (1997).

26 *Protocole de la Conférence d'Aix-la-Chapelle due 15 novembre 1818*, in De Clercq (1880), pp. 175-176.

lanza cristiana. La diplomazia, in realtà, a sua volta traduceva in lettera diplomatica un sentimento più antico, lo stesso che aveva portato per esempio, nel secolo precedente, Georg Friedrich von Martens a riconoscere come legittimo l'intervento (comunque eccezionale) in soccorso dei propri correligionari: si sarebbe stati «*parfaitement en droit de venir à l'appui de ceux qui professant une même religion avec elle*», scriveva nei *Précis du droit de gens moderne de l'Europe* del 1789²⁷. Immaginando una sintesi tra i due momenti, furono le prassi europee di intervento dagli anni Venti in poi nei confronti dei cristiani d'Oriente, per esempio, e, dunque, dei focolai nazionalistici in area balcanica a dare prova di come quella «*fraternité chrétienne*» potesse riuscire nel suo scopo, “liberando” i semi delle nazioni dalle spine ottomane che li soffocavano²⁸. Penso al caso greco o, più in generale, a tutti gli interventi *on behalf of*, promossi a favore delle comunità cristiane d'Oriente²⁹: buona parte di queste sarebbe stata avviata e accompagnata dall'Europa verso il processo nazionalistico. Era o non era anche questa la «*fraternité chrétienne*»?

Se, dunque, era dalla fraternità cristiana che bisognava partire per infondere credibilità, forza e fiducia al progetto nazionalistico, quest'ultimo restava comprensibile e legittimo solo nella dimensione internazionale. Nell'invenzione della nazione, cioè, non si poteva prescindere dal riconoscere nella storia e, in particolare, nella storia del diritto internazionale, un fondamento comune. Quel diritto internazionale dell'Ottocento non era altro, infatti, che il diritto delle nazioni cristiane e, civili, d'Europa. La cristianità, infatti, nonostante gli sforzi della nuova scienza del diritto internazionale volti a laicizzarne i postulati, rimaneva *katéchon*, avrebbe detto Carl Schmitt³⁰, forza frenante in grado di tenere insieme anche un «agglomerato di popoli vari»³¹, ripensandoli nella comunità cristiana. D'altronde, anche a Parigi, nel 1815, i sovrani di Austria, Prussia e Russia avevano costituito la Santa Alleanza e sottoscritto l'atto nel quale si stabiliva che «il solo principio in vigore tanto fra i Governi, quanto fra i loro sudditi, sarebbe [dovuto essere] quello di fa-

27 Von Martens (1789, 1858), p. 316. Sull'intervento rinvio a Augusti (2012), pp. 277-330.

28 Forte la suggestione della parabola del seminatore, raccontata dai tre vangeli sinottici, Matteo 13, 1-23, Marco 4, 1-20 e Luca 8, 4-15. Bat Ye'or (2009), p. 228, parla di «compassione e simpatia» degli europei per le «vittime [della] millenaria oppressione» ottomana.

29 Rimando a Augusti (2013), pp. 176 e ss.

30 Schmitt (2003), pp. 42 e ss.

31 Chabod (1961), p. 63.

vorirsi reciprocamente e di considerarsi come membri di una stessa nazione cristiana»³².

Ma mentre la cristianità, con forza espansionistica, quasi una nuova “evangelizzazione colonizzatrice”, produceva nazionalità, la percezione dell’inevitabilità dell’«assorbimento» nella “grande nazione cristiana” attivava almeno due processi opposti: quello dei contronazionalismi di coloro ai quali si imponeva di fatto la scelta fra assimilazione e inferiorità³³; e quello dei micronazionalismi, e dei conseguenti fenomeni di conflittualità etnica, intestini alle neocostituende nazioni³⁴. «Pietra d’inciampo» nel processo creativo nazionale (e comunque salvezza dai fenomeni appena citati) si rivelò l’esistenza dei grandi imperi multinazionali, per alcuni «soluzione meno inaccettabile» rispetto a quella dell’assorbimento nazionalistico³⁵. Lì, a tenere insieme, non sarebbe servita la cristianità: meglio avrebbe un altro culto, «il culto della *dinastia*»³⁶ (si pensi, per esempio, a quella degli Asburgo). Lì la nazione non avrebbe fornito alcuna spinta progressista, anzi, avrebbe portato disordine e divisione. Lì la nazione restava tradita dall’alternativa dell’impero.

2. Il tempo della nazione. Lealtà e ossessione di un modello

Se nell’impero la nazione restava tradita, nella nazione la nazione finì col tradire se stessa. Nonostante il *pathos* patriottico e l’*animus* cristiano, nell’Ottocento i «vincoli di lealtà nazionali» rimasero per lo più deboli; la nazione «non [fu] – come ci si sarebbe aspettato – il prodotto di una generazione spontanea, bensì un manufatto», un’invenzione, appunto³⁷. Il tradimento veniva da quella così osannata eredità di caratteri comuni e dalla loro “irriducibilità”³⁸.

32 Nella traduzione di Coppi (1827), p. 413.

33 Hobsbawm (2010), p. 119.

34 Kelman (1969).

35 Hobsbawm (2010), pp. 14-15.

36 Chabod (1961), p. 63; Schulze (1995), p. 233, parla a tal proposito di «nazioni nobiliari» per distinguerle dalle «nazioni popolari»; cf. anche Leonhard, von Hirschhausen (2014), pp. 17 e ss.

37 Hobsbawm (2010), p. 116.

38 «Lo stesso, che ai costumi delle nazioni, avviene alle lingue. Chi volesse in Italia usar vesti cinesi o quei riti, per cagione dei quali tanto si è disputato e si disputa fra teologi, egli sarebbe dileggiato, perché altro sistema ha questo cielo ed altro il cinese. Ciò che

Scongiurando «l'errore modernista»³⁹ e coinvolgendo nella ricostruzione del paradigma nazionale anche la riflessione settecentesca, si vede come questa idea di nazione intesa come individualità “irriducibile” fosse già presente, per esempio, in Johann Gottfried Herder. Se prima si era creduto nella “comunione” della natura umana, “modificata” solo dall’ambiente e dall’educazione attraverso il clima e la storia, dal filosofo Herder in poi, dice Chabod, si affermava la diversità fondamentale, originaria e naturale delle nazioni. Ogni nazione era impenetrabile, i caratteri di ognuna erano autentici e permanenti: sarebbero durati millenni se fossero stati preservati dalle mescolanze straniere, «se [la nazione fosse rimasta] attaccata al suo suolo come una pianta»⁴⁰. Fu Herder, tra l’altro, a creare la stessa parola *nazionalismo*:

«lo si chiami pure pregiudizio, volgarità, limitato *nazionalismo*, ma il pregiudizio è utile, rende felici, spinge i popoli verso il loro centro, li fa più saldi, più fiorenti alla loro maniera e quindi più felici nelle loro inclinazioni e scopi [...] La nazione più ignorante, più ricca di pregiudizi, è spesso la prima: l’epoca delle immigrazioni, di desideri stranieri, dei viaggi di speranze all’estero è già malattia, pienezza d’aria, gonfiezza malsana, presentimento della morte»⁴¹.

Herder, ad argomentazione e riprova di quanto affermava, usava il caso tedesco: certo, in Germania la mescolanza di «lieviti stranieri» c’era stata e aveva servito da «fermentazione»; ma per effetto di quei lieviti, aggiungeva, «[quei] popoli [...] [erano stati] spogliati della loro nobiltà [e avevano] completamente perduto la loro natura in una lunga servitù del pensiero»⁴². Il *nazionalismo*, in quella fase di debolezza ed incertezza sociale, aveva una funzione “di dominio”, ritornava utile cioè per «cementificare la coesione del sistema sociale»⁴³. Lontano dal catalizzatore della cristianità, funzionava comunque, come vera e propria «stampella ideologica» dello Stato sovrano, utile a preservare l’idea dello Stato-nazione⁴⁴.

Nell’esperienza francese, quell’ “irriducibilità” della nazione cominciò a

è ornamento ad un Pechinese o Nanchinese, diverrebbe colpa e sconvenevolezza in un Romano, in un Fiorentino», Muratori (1706), p. 50. Cf. Chabod (1961), p. 53.

39 Smith (2000), p. 45.

40 Chabod (1961), p. 47.

41 Chabod (1961), p. 48.

42 Chabod (1961), p. 50.

43 Corino (2016), p. 12.

44 Vatikiotis (1998), p. 58.

vacillare prima che altrove: per Nicolao Merker, alla nazione apparteneva in prima istanza non tanto chi fosse stato etnicamente francese, bensì chi avesse condiviso la Dichiarazione del 1789 e via via le Costituzioni nate dall'esperienza rivoluzionaria. Il requisito giuridico principale per la naturalizzazione di uno straniero era infatti il cosiddetto "giuramento civico", ovvero il giuramento "di essere fedele alla nazione"⁴⁵. Non valeva alcun automatismo, neanche per i francesi per discendenza e nascita, ai quali si chiedeva una nuova adesione. Così, quando Emmanuel Joseph Sieyès, nel pamphlet *Che cosa è il terzo stato?* del 1789 definiva la nazione «un corpo di associati che vive sotto una legge comune ed è rappresentato da uno stesso legislativo» e poi sottolineava che l'appartenenza di stirpe non contasse più, dato che «le razze si [erano] mescolate» e che «il discendere dai galli e dai romani vale[va] almeno quanto il discendere dai sicambri, dai velchi o da altri selvaggi usciti dai boschi e dalle paludi dell'antica Germania»⁴⁶, non solo spostava l'attenzione dal *factum* al *pactum*, ma descriveva una nazione in grado di superare il piano etno-confessionale, della "fratellanza cristiana", e di tradire se stessa muovendo verso quello della consapevolezza giuridica. La nazione si concretizzava; si trasformava da fatto «puramente linguistico-culturale» in «fatto politico»⁴⁷, da atto di fede in patto di buona fede.

Lo Stato, lentamente, ricompariva: la sua idea, momentaneamente «arretrata di fronte alla nazione», recuperava terreno⁴⁸. Per quanto «soggetto politico artificiale e arbitrario, frutto ben spesso di esercizi potestativi, di compromissioni e di abusi dei poteri supremi»⁴⁹, tornava al centro dell'analisi, nobilitato nella sua missione di risolvere i conflitti politico-sociali interni e le relazioni, spesso egualmente conflittuali, Stato/società e Stato/popolo, e di stemperare le pretese micronazionalistiche. Negli anni Sessanta dell'Ottocento, grazie alle nuove consapevolezze, all'esperienza unitaria⁵⁰ e al lavoro di

45 Merker (2009), p. 20.

46 Sieyès (1789), pp. 16-17; cf. Merker (2009), p. 20.

47 Chabod (1961), p. 67.

48 Nuzzo (2007), p. 167. Bluntschli e von Gerber, riprendendo la proposta metodologica avanzata da Friedrich Carl von Savigny, attribuirono ai giuristi il compito di procedere alla costruzione giuridica dello Stato. Sul punto vedi Nuzzo (2012a), pp. 101 e ss.

49 Grossi (2012) cit. Pasquale Stanislao Mancini, in Jayme (1994).

50 «Certamente al di d'oggi, dicendo nazione, dobbiamo intendere per nazione un aggregato di persone formate a Stato», *Processi verbali delle sedute della Commissione speciale nominata con R. Decreto del 2 aprile 1865 al fine di proporre le modificazioni di coordinamento delle disposizioni del Codice Civile e le relative disposizioni transitorie a*

consolidamento di giuristi come Giuseppe Pisanelli, in Italia, per esempio, si arrivò alla sintesi per cui ogni Stato avrebbe dovuto «comprendere integralmente la nazione da cui risulta[va], ed ogni nazione [avrebbe avuto] diritto ad [...] uno Stato proprio [...] Le nazioni [...] non acquista[va]no un carattere individuo, ed una personalità giuridica che nella unità dello Stato»⁵¹. Di converso, nello “Stato-nazione” il popolo non sarebbe più risultato semplicemente come «la somma casuale di tutti coloro che [facevano] parte dello Stato», ma sarebbe stato un «tutt’uno con la nazione, la quale si presenta[va] come una comunità non solo culturale, ma anche politica»⁵². Per Ernest Renan, la nazione era un «plebiscito di tutti i giorni», un rinnovamento quotidiano del *pactum*⁵³. Per quanto “chiaro” in apparenza, questo discorso però si prestava ad essere «gravemente frainteso[o]»: anche per questo la nazione necessitava dello Stato⁵⁴.

Romagnosi affrontò il problema dello Stato già nella sua *Introduzione allo studio del diritto pubblico universale* del 1805⁵⁵. Il primo punto veramente cruciale del suo lavoro fu il concetto di «Stato elevato a civiltà»: «lo Stato ha l’obbligo di promuovere l’incivilimento»⁵⁶, scriveva. E ancora:

«il perfezionamento che appellasi incivilimento, in alcuni casi è un’ineludibile necessità: una nazione ritardando di porsi al livello dei progressi degli altri popoli potrebbe avventurare la propria sicurezza»⁵⁷.

mente della Legge di detto giorno, Torino, Stamperia Reale, 1866, p. 623, citato in Jayme (1989), p. 28.

51 Pisanelli (1862), pp. 18-23; Cf. Nuzzo (2007), p. 167; Lacchè (2005), pp. 149-174; Vano (2005). Sull’esperienza italiana, vedi Nuzzo (2012a), pp. 87-124; Costa (1990), pp. 89-125; Fioravanti (2001).

52 Schulze (1995), p. 229.

53 Renan (1993), p. 3. Cf. Tuccari (2000); Chabod (1961), p. 71; Scoppola (1998), p. 81.

54 Secondo Galli Della Loggia (1996), p. 5, «In Italia [...] la nazione [...] lungi dal preesistere allo Stato ne [era] stata, invece, piuttosto una creatura, quasi un effetto derivato. Nella nostra storia – aggiungeva – l’esistenza della nazione è indissolubilmente legata all’esistenza dello Stato (nazionale), sicché, da un punto di vista storico il concetto e il sentimento di patria costituiscono precisamente il riflesso ideologico-emotivo di questo intreccio».

55 Mannori (1984), vol I; Costa (2000), pp. 497 e ss.

56 Romagnosi citato in Di Ciommo (2005), pp. 91-92.

57 Romagnosi citato in Di Ciommo (2005), pp. 91-92.

Sulla via dell'incivilimento, dunque, grazie allo Stato: solo un'ampia e sistematica pianificazione legislativa dall'alto poteva «condurre una nazione al vivere civile». Lo Stato doveva essere razionale, poiché «il dar leggi non [poteva] essere mai un atto di arbitrio, ma di ragione»; doveva essere modellato «a norma di giustizia pubblica» più che sulle «leggi di un calcolato interesse», e nel contempo [mostrarsi] funzionale a un progetto di civiltà tale da determinare un profondo rinnovamento dell'identità nazionale⁵⁸. La nazione si realizzava, si perfezionava attraverso lo Stato: se nella nazione era il progresso dell'umanità, nello Stato era la civiltà della nazione.

Il ritorno dello Stato e il suo affiancamento, e poi la sua sovrapposizione, alla nazione permettevano finalmente una compenetrazione tra psicologico e giuridico. Più che per fatto di natura o per atto di fede, alla nazione si finiva con l'appartenere per sentimento d'attaccamento, per senso d'appartenenza, per adesione a quella o a quell'altra comunità giuridicamente riconosciuta. Charles Tilly, alla fine del secolo scorso, avrebbe parlato dell'attivazione di un «processo di identificazione e di collocazione della propria lealtà» dal gruppo etnico alla comunità locale, allo Stato-nazione, allo Stato nazionale⁵⁹.

Al di là delle peculiarità della nazione, dello Stato-nazione o dello Stato nazionale, lo strumento per raggiungere le garanzie di progresso e di civiltà era la forma-nazione: in quanto “manufatto”, conservava un certo carattere di “generalità e astrattezza”, era disponibile a livello globale e, dunque, si prestava ad una immediata trasferibilità. Sembrava innegabile che il «far nazioni» («*nation making*»), come lo chiamava Walter Bagehot⁶⁰, fosse un processo comune a tutto il mondo occidentale, caratteristica ovvia e dominante dell'Ottocento⁶¹. Come in un “Lego”, nella costruzione delle identità la forma-nazione permetteva assemblaggi differenti a partire dalle stesse categorie elementari. È in questo senso che il sociologo Orvar Löfgren ha parlato di «kit per il fai da te» della forma-nazione, alludendo provocatoriamente ad una serie di procedure necessarie alla sua elaborazione, al suo trasferimento

58 Romagnosi citato in Di Ciommo (2005), pp. 91-92.

59 Tilly (1984). «È allo stesso tempo vero e significativo che la maggior parte degli stati presenta un carattere pluralistico. Sotto questo aspetto, non si tratta chiaramente di stati-nazione, ma tutt'al più di “stati nazionali”. In termini stretti, possiamo definire un soggetto come “stato-nazione” solamente quando e se un singolo gruppo etnoculturale è inserito nei confini di uno stato che a sua volta si estende fino a includere al suo interno i confini territoriali del gruppo etnoculturale in questione», Smith (2000), pp. 99-100.

60 Cf. Bagehot (1872).

61 Hobsbawm (2010), p. 103.

e, addirittura, alla declinazione di un'«anima nazionale»⁶². Per Thiesse esisteva una vera e propria «lista di elementi simbolici e materiali» che una nazione degna di questo nome doveva però offrire:

«una storia che stabilisca la continuità con i grandi antenati, una serie di eroi prototipi di virtù nazionali, una lingua, dei monumenti culturali, un folclore, dei luoghi sacri e un paesaggio tipico, una mentalità particolare, delle rappresentazioni ufficiali – inno e bandiera – e delle identificazioni pittoresche – costume, specialità culinarie e animale totemico»⁶³.

Le nazioni che avevano avuto diritto al riconoscimento politico, e soprattutto quelle che lo avevano rivendicato, avevano testimoniato il carattere prescrittivo di questa «lista di priorità identitarie». L'ossessione del modello forma-nazione, il miraggio della modernità, creavano però, spesso, nazioni poco credibili, nazioni in cui, su tutti, il difetto della storia non faceva che esasperarne l'inadeguatezza sul piano del confronto tra pari a livello internazionale. «Sistematizzare» la nazione aveva significato rinunciare alla storia⁶⁴. La nazione «non-storica» o «semi-storica» era, infatti, il più delle volte una piccola nazione che difficilmente sarebbe riuscita, con le sue forze, a sopravvivere a quello spirito progressista che ne aveva avviato l'esistenza. Se, infatti, per i campioni del formalismo nazionalistico, lo Stato-nazione avrebbe dovuto sviluppare un'economia, una tecnica, un'organizzazione statale e una forza militare dotati di vita propria, era pur vero che una nazione giovane e senza un percorso di tensione nazionalistica difficilmente sarebbe riuscita nell'intento. La prova del progresso non era alla portata di tutti, e questo permetteva di trovare un argomento legittimo alla negazione per i popoli piccoli e arretrati del carattere di «vere» nazioni. Le «piccole nazioni» avevano un loro tempo, somigliavano più alle antiche formazioni di identità nazionale, lontane dai processi di identificazione con lo Stato⁶⁵. Per Hobsbawm, esse erano semmai delle «idiosincrasie provinciali nell'ambito di «vere» e più vaste nazioni». Erano queste, le grandi, le «progredite», le consolidate dalla storia, ad essere destinate a prevalere o a uscire vincitrici dalla lotta per l'esistenza⁶⁶. Anzi. Le «grandi nazioni», proprio per la loro natura di «veicolo del progresso

62 Orvar (1989).

63 Thiesse (2001), p. 9.

64 Augé (2009), p. 34.

65 Padoa Schioppa (2002), p. 62.

66 Hobsbawm (2010), pp. 105-107.

storico e sociale», una volta esaurita la loro funzione nella storia mondiale, «consistente nel convogliare tutti i popoli verso il processo di civilizzazione», sarebbero state sostituite a loro volta da forme di aggregazione umana ancora più grandi e potenti. Le “grandi nazioni” avrebbero ceduto il passo «a unioni o comunità a livello continentale e regionale», avviando un “nuovo imperialismo”⁶⁷.

Esisteva una grande nazione, la grande nazione cristiana, quella della «fraternité chrétienne» e della Santa Alleanza. La grande nazione cristiana instillava il principio di nazionalità nelle nazioni: di queste, le grandi, le cristiane, parafrasando Martti Koskenniemi, “le miti civilizzatrici delle nazioni”⁶⁸, si sarebbero imposte e si sarebbero messe, per quello spirito di “missione” manciniano, alla guida del progresso e della civiltà delle altre, le piccole; queste ultime, pur condividendo lo strumentario del cambiamento, sarebbero state sempre soggette al dominio delle grandi, legittimandone in questa tensione di necessità, le nuove politiche di controllo.

3. Al limite del *nomos*: l’uso “deviato” della forma-nazione

Negli stessi anni in cui Chabod perfezionava il suo itinerario logico dell’idea di nazione, Elie Kedourie riconosceva le origini europee della dottrina nazionalistica e si interrogava sugli esiti di un trapianto della forma-nazione in area medio-orientale⁶⁹; Rupert Emerson, intanto, ripercorreva gli itinerari dei nazionalismi emergenti all’indomani della dissoluzione degli imperi coloniali in Asia e in Africa⁷⁰. Al di là della spazialità giuridica europea, fuori dal *nomos*, le “nuove” nazioni risultavano «drammaticamente visibili»⁷¹. La loro era una storia che iniziava spesso in maniera anomala⁷²: nessuna rivoluzione, nessuna sveglia della moltitudine. Non si arrivava alla nazione per così dire *motu proprio*, ma per intervento esterno. Questo implicava che, spesso, nell’inquadramento posticcio nella forma-nazione i tre elementi di Stato, nazione e società si saldassero a stento. I confini apparivano fragili,

⁶⁷ Smith (2000), p. 33.

⁶⁸ Koskenniemi (2012).

⁶⁹ Cf. Kedourie (1960). Sul concetto di “trapianto” e sui suoi esiti attuali rinvio a Augusti (2016).

⁷⁰ Romeo (1987), p. 144.

⁷¹ Hobsbawm (2010), p.103.

⁷² Per Reinhard (2002), p. 235, erano «popoli senza storia e senza scrittura».

disegnati dalle potenze coloniali più in funzione dei propri interessi strategici che della distribuzione dei gruppi etnici. Inoltre, questa assenza di un minimo comune denominatore culturale spesso inceppava *ab origine* il funzionamento della nuova macchina politica⁷³. Una forma di dominio coloniale “indiretto”, dunque, che contribuiva all’«obliterazione culturale» immaginata da Frantz Fanon: quei popoli venivano in qualche modo “disconnessi” dalla loro cultura attraverso la negazione della loro realtà locale, l’introduzione di nuovi rapporti giuridici e l’asservimento sistematizzato a nuovi impianti istituzionali⁷⁴. Un’operazione a sua volta effetto dello storicismo occidentale, del tempo storico cioè inteso come misura della presunta distanza culturale che separava l’Occidente dal non-Occidente, la civiltà dalla barbarie. Al di là della spazialità giuridica europea, fuori dal *nomos*, le nazioni rispondevano a quella struttura del tempo storico globale per cui “prima in Europa e poi nel resto del mondo”⁷⁵. Il Vecchio Continente veniva descritto come il luogo in cui tutto era comparso per la prima volta, il “resto del mondo” era il luogo del “non ancora”, del *not yet*⁷⁶: l’intervallo storico necessario allo sviluppo e alla civilizzazione sarebbe stato colmato dall’educazione coloniale⁷⁷. Per Luigi Nuzzo, quello scarto temporale «poteva essere investito dagli effetti benefici della temporalità moderna e divenire oggetto dei suoi miti», ma la storia «doveva ancora iniziare o iniziava in quel preciso momento con la colonizzazione europea»⁷⁸. La forma-nazione e la sua mitologia rappresentavano quel tempo nuovo, deviato perché vincolato ai parametri del discorso, dominante, imperiale del quale condividevano lo strumentario⁷⁹. Fatto salvo (ove ci fosse stato) il livello per così dire “spirituale” dei fenomeni nazionalistici, quell’ambito cioè «vero ed essenziale» per cui una nazione esisteva ed era sovrana molto prima che lo diventasse anche politicamente, la forma-nazione si trasferiva infatti come premessa necessaria all’impianto della complessa discorsività

73 Scartezzini (2000), pp. 21-22. Sullo spazio coloniale come proiezione della sovranità delle nazioni e, più in generale, sulla costruzione dello spazio “dato” e “deciso”, vedi Meccarelli (2015), p. 247. Fu lo stesso Mancini (1851), p. 46, a rilevare come «uno Stato in cui molte rigogliose nazionalità vadano a soffogarsi in un’unione forzata, non è un corpo politico, ma un mostro incapace di vita».

74 Fanon citato in Nuzzo (2013).

75 Chakrabarty (2004), pp. 22-23.

76 Fabian (1983); Mill (1981).

77 Chabod (1961), pp. 89-91.

78 Nuzzo (2006), p. 3.

79 Chatterjee (1993).

giuridica occidentale (costituzioni, rappresentanza, parlamenti, codici, etc.) che l'avrebbe seguita⁸⁰. Benedict Anderson parlò di carattere modulare del concetto di "nazione", proprio in riferimento alla creazione degli Stati nazionali all'indomani della crisi degli imperi⁸¹. Ma non solo. La forma-nazione si prestava ad un doppio uso: era sì strumento per superare i vecchi imperi dinastici⁸², ma era anche strumento di controllo dei nuovi imperi coloniali.

Kedourie rafforzava quest'analisi con una riflessione critica sull'idea di nazione e sul nazionalismo: quest'ultimo, scriveva, era un prodotto della «disaffection» degli intellettuali, una parte di quel "tragico dispiegarsi" della modernità nella storia del mondo; niente di più che una "manipolazione" di quel «totally universalistic principle of self-determination» così chiaramente enunciato da Kant. Un'inutile complicazione, una distorsione. Il principio, a suo dire, era stato «twisted» dai filosofi tedeschi (e non solo) per "servire" «the celebration of particularism and parochialism in nationalist ideology»⁸³. L'approccio dello storico capovolgeva, dunque, l'assunto consolidato dall'esperienza giuridica occidentale ottocentesca per cui la nazione precedeva naturalmente (e provvidenzialmente) lo Stato. In questo pensiero, però, Kedourie non era solo; su più punti il suo ragionamento riprendeva quello del sociologo e antropologo inglese Ernest Gellner, suo contemporaneo. Per Gellner le nazioni non erano il prodotto della storia culturale, linguistica e religiosa dei singoli popoli, ma la creazione di gruppi di potere che, valendosi della mediazione degli intellettuali, avevano predisposto apparati ideologici a titolo di giustificazione di un'istanza di unità politica. Più in generale: non era stata l'appartenenza a legittimare la sovranità, ma viceversa; non ci poteva essere nazione senza Stato⁸⁴; la nazione altro non era che un'invenzione per legittimare l'esercizio del potere dello Stato e, in prospettiva, quello della società degli Stati.

L'idea di nazione di Kedourie come di Gellner, così contaminata dalla sua

80 Chatterjee (1993); Balibar (1991), pp. 86-106. Cf. in questi termini, Conrad (2015), p. 149; vedi diffusamente su questo aspetto Augusti (2016).

81 Anderson (2009), p. 91. Sui meccanismi concreti della diffusione della forma-nazione, Cf. Goswami (2000), pp. 776-783.

82 Per Leonhard, von Hirschhausen (2014), p. 9, «dal 1870 in poi, di fronte alla superiorità di efficienza, capacità produttiva e attitudine bellica di cui sembrava dar prova lo stato nazionale, per gli imperi divenne sempre più urgente decidere come reagire a questo modello».

83 Kitromilides (2005), p. 661.

84 Gellner (1997); Cf. Lanaro (1991), p. 355.

dimensione “esterna” o “di ritorno”⁸⁵, ci viene utile nel tentativo di comprensione di un’esperienza a sé di uso strumentale della forma-nazione: al limite del *nomos*, mi riferisco a quella dell’Impero ottomano⁸⁶. Alle tendenze imperialistiche degli stati nazionali si contrapposero, infatti, i tentativi di nazionalizzazione degli imperi, frutto di un «serrato confronto» con i modelli di forma-nazione disponibili, al fine di trasferirli «selettivamente» nella propria esperienza di società multietnica⁸⁷. Quello ottomano ne fu un esempio: lo stato di deriva al quale si era avviato nell’Ottocento, aveva convinto l’ala progressista della élite ottomana della necessità di superare le obsolete architetture del governo e di ripensare l’impero come nazione moderna, come Stato-nazione. Da nazione, infatti, avrebbe potuto scongiurare la crisi e ritagliarsi un ruolo nella comunità internazionale. In questa aspirazione l’Islam non sembrava avvertirsi come limite, né giocare alcun ruolo frenante: d’altronde, l’episodio della partecipazione al congresso di Parigi del 1856 aveva indotto questo genere di ottimismo, per nulla svilto dalla dottrina mazziniana della “fratellanza” e dalla mitopia della “grande nazione cristiana”⁸⁸. In questo percorso di ripensamento, di re-invenzione, la Porta arrivò a promulgare nel 1869 una Legge sulla nazionalità e, addirittura, nel 1876, a suggellare in un testo costituzionale (per quanto poco duraturo)⁸⁹ un’identità nazionale impiantata *ex novo*, ricondotta con sollecitudine all’*Osmanlılık*, all’“ottomanesimo”, e legata indissolubilmente all’ideale di integrità e unità dello Stato.

Scollata del tutto dall’elemento “popolare” nonché, ovviamente, da quello mistico-confessionale della “fratellanza cristiana” (del cui dovere solidale non poteva godere), puro artificio nelle mani dell’élite, la nazione ottomana somigliava molto di più a quella riletta da Kedourie che non a quella immaginata da Mazzini. L’ottomanesimo ottocentesco non aveva grande *appeal*

85 Penso, in questo senso, alle teorie di Becker Lorca, per il quale sarebbero da valorizzare le dinamiche grazie alle quali categorie e modelli d’uso comune nel diritto di matrice europea, parzialmente assorbiti dai sistemi di destinazione, vengono restituiti all’Europa. Cf. Becker Lorca (2010), pp. 481, 475. Cf. Augusti (2016).

86 Cf. Gürpınar (2013).

87 Leonhard, Hirschhausen (2014), p. 10.

88 Prendo a prestito il lemma “mitopia”, così come immaginato da Bellini (2011), p. 81. Sulle vicende legate direttamente e indirettamente alla “partecipazione” della Sublime Porta al congresso parigino del 1856, rinvio a Augusti (2013).

89 Per uno studio sul costituzionalismo nel pensiero politico arabo-islamico, Bahlul (2002), pp. 617-645. Cf. anche Makdısı (2002), pp. 601-617. Vedi diffusamente Augusti (2013), pp. 334 ss.

per i *millet* ottomani⁹⁰, appariva come una scelta dettata dalle contingenze, un «political style»⁹¹, una goffa “reazione nazionalistica” all’ingombrante presenza straniera; la replica acerba alla moltiplicazione di gruppi, nazionalità e minoranze etniche di un governo esasperato. L’ottomanesimo ottocentesco era l’imposizione del concetto di Stato-nazione a un mosaico di «intermingled people» per religione, etnie, lingue e culture diverse⁹²; l’alternativa imposta ai nazionalismi “insoddisfatti” di quelle province la cui «national consciousness» era ancora in formazione⁹³. D’altronde, non ebbe esiti più felici. Perché? Per una parte della storiografia l’insuccesso del “trasferimento” della forma-nazione era da ascrivere all’estraneità del concetto di nazione alla tradizione giuridica islamica, «che conosce non la “nazione”, ma la “comunità dei credenti”»⁹⁴; al fatto che le nazioni fossero percepite più come «surrogato di un concetto squisitamente tribale» che come premesse naturali degli Stati, dei quali tra l’altro non condividevano il linguaggio della sovranità territoriale⁹⁵. L’appartenenza alla comunità dei credenti, alla *ummah*, pre-

90 Tunaya (1948), p. 48.

91 Tamer Torun (2015), p. 255.

92 Kappeler (1992), p. xviii; Nielsen (2012).

93 Seton-Watson (1971), p. 3. La Porta aveva conosciuto una tradizione di moltiplicazione di autonome comunità nazionali, i cosiddetti *millet*, soggetti ciascuno al proprio leader religioso. Il sistema dei *millet* aveva applicato il principio della personalità della legge: qualsiasi membro, indipendentemente da dove si trovasse, era soggetto alla giurisdizione della sua comunità religiosa. Questo della giurisdizione era stato letto come un privilegio e dunque, secondo la lettura che ne ha dato recentemente Adanir (1992), pp. 166-167, come fonte possibile di conflitto «between the *millet* hierarchies and the modernising centralist state». L’ottomanesimo era un concetto di nazione politica che per sua stessa natura superava questo principio della personalità della legge e muoveva verso quello dell’unità territoriale dello Stato. Ciò nonostante sarebbe rimasto esso stesso “insoddisfatto”, ferito tra l’altro dagli abusi di naturalizzazione dei suoi sudditi, da quelle pratiche cioè avviate intorno alla metà del secolo in concomitanza con l’attivazione delle giurisdizioni consolari che avrebbero portato lentamente sotto la protezione europea un numero sconsiderato di individui, abbagliati dalle garanzie occidentali e dalla migliore qualità della vita da “protetti” delle nazioni occidentali. Erano state queste, tra l’altro, le premesse alla Legge sulla nazionalità del 1869. Cf. Bernardini D’Arnesano (2004); Arminjon (1903); Papasian (1911), pp. 286-301; Augusti (2017b). Cf. Schulze (2004), p. 35; Donini (1998), p. 70; Poggi (1995), pp. 43-53; Muge Göçek (1993), pp. 507-538. Vedi anche Poggeschi (2010).

94 Gozzi (2015), p. 122, cita, con riferimento all’esperienza di nazionalismo algerino, Sayad (2003).

95 Mela (2005), p. 175. Vedi anche Vercellin (2003), pp. 87 e ss.

scindeva dall'etnia, dal territorio e dai suoi confini. La *Sharī'a*, d'altronde, non era semplicemente una legge o un codice dello Stato: era un vero e proprio sistema di valori «transcending regional, ethnic, and racial allegiances», rappresentava la comunità musulmana globale, «the polity united around brotherhood in Islamic faith»⁹⁶, individuava un' «altra» fratellanza. In altri termini, se quello della *Sharī'a* era un concetto “metacostituzionale”, quello della *ummah* era un concetto “metastatale”⁹⁷. La *ummah* non aveva bisogno dello Stato. Nel momento in cui la stessa Costituzione del 1876 riconosceva all'articolo 11 l'Īslām a religione di Stato, mancava l'appuntamento con la secolarizzazione e conduceva irrimediabilmente il progetto nazionale ad un corto circuito: il compromesso panislamico era insostenibile e, non essendo funzionale allo scopo, avrebbe condotto le ingenuie aspirazioni nazional-ottomanistiche al fallimento⁹⁸.

4. Crisi, letture *global*, contaminazioni e nuove prospettive

Rileggendo la lezione ottocentesca sulla nazione, ciò che suggestiona è un'inaspettata attualità della visione mazziniana e un'interessante trasfigurazione della *ummah* nel linguaggio globale: se la nazione di Mazzini sembra molto più vicina al mito della comunità globale di oggi che non all'esperimento dello Stato-nazione di due secoli fa, la lezione islamica, per nulla corrotta dall'invenzione dello Stato, si lascia rileggere dalle suggestioni di sovrastualità occidentali. Ciò che condiziona di più queste ipotesi, al limite della provocazione, è il rapporto che la nazione conserva oggi con lo spazio, con il territorio, a sua volta parte integrante della definizione di comunità nazionale, con i confini e le frontiere, con l'individuo e le degenerazioni identitarie e iperlocalistiche e con l'avvertita crisi/scomparsa dello Stato⁹⁹.

Il territorio, nell'Ottocento, appariva unitario in quanto proiezione ge-

96 Senturk (2006), pp. 535-536.

97 Cf. Morbidelli (2006).

98 Cf. Augusti (2013), p. 338.

99 Il tema della crisi dello Stato moderno è stato oggetto di analisi ricca e densa dalla nota prolusione pisana di Santi Romano *Lo Stato moderno e la sua crisi* del 1909 agli interventi di Capograssi del 1921, di Del Vecchio del 1933, proseguendo con Tarello, Mazzacane, Ferrajoli, Cassese. Tra gli ultimi contributi, si veda il numero monografico di «Ars Interpretandi» 16, 2011, *Lo Stato contemporaneo e la sua crisi*, ed in particolare Viola (2011); Mazzarella (2011); Fioravanti (2011); Corso (2011); Condorelli (2011).

ografica di una nazione unitaria. Al di là dei buoni propositi e delle giuste aspettative, però, spesso si trattava di uno spazio da destinare alla nazione, ma non già esistente¹⁰⁰; quell'unitarietà e la sua mitologia appartenevano più alla dimensione della "fratellanza", alla dimensione "spirituale", cioè, che non a quella geopolitica della nazione, ad uno spazio "immaginato", che esisteva in quanto proiezione tanto della "grande nazione cristiana" quanto della *um-mah* dell'Islam sul globo. Ciò che mise duramente alla prova il discorso spirituale (e universale) della nazione fu dunque la sua traduzione nel progetto di Stato-nazione: il confronto con la macchina giuridica dello Stato e con la *societas civilis*¹⁰¹ da una parte, e la declinazione "etnica" della nazione, il suo rapporto cioè con i gruppi etno-confessionali e la loro distribuzione entro i confini politici dello Stato, dall'altra, produssero la sensazione di una forzatura, di una violenza. Nel tempo, questa sensazione si è acuita: quei «piccoli popoli virtuali» rappresentati dai gruppi, insieme al periodico "travaso" migratorio di «intere etnie all'interno di contesti culturali alieni in senso linguistico, religioso e valoriale», hanno inciso irreparabilmente sul discorso della nazione e hanno complicato la stessa tenuta dello Stato-nazione. Parlando di circolazione dei soggetti, le reti transnazionali, così come si sono strutturate nel tempo, hanno facilitato questi trasferimenti e, spesso, messo in discussione il ruolo stesso delle frontiere come limiti stabili nell'organizzazione dei territori. La sovranità territoriale degli Stati ne è uscita attenuata, l'immagine della società incerta: ogni logica di appartenenza si è rivelata decisamente in-stabile¹⁰². Alain Tarrus ha parlato a tal proposito di «déplacements de proximité», di prossimità inconsuete, imprevedibili, che si sono palesate tra luoghi e nazioni¹⁰³.

Ma è cambiata anche la percezione della nazione. Come ha notato Paolo Bellini, l'identità del popolo-nazione, diffusa socialmente attraverso le istituzioni e la produzione mediatica – poli attuali di implementazione della costruzione del consenso e della creazione di un sistema di valori collettivamente condiviso – ha perso nel tempo la sua unità linguistica, culturale e valoriale. L'immaginario collettivo ha smarrito di fatto il contatto con la nazione; quell'elemento nazionale ottocentesco si è «frantuma[to] in un in-

100 Meccarelli (2015), p. 247.

101 Schiera (1999), p. 30.

102 Berthomier, Hily (2011), p. 321; cf. Augusti (2017a), p. 54.

103 Tarrus (2007), p. 132.

sieme complesso di gruppi e di identità – spesso – tra loro in conflitto»¹⁰⁴; o, forse, quei frammenti, da sempre esistenti, sotto la spinta degli eventi attuali sono semplicemente riemersi in tutta la loro drammaticità, segno che nel passaggio dalla moltitudine al popolo, dal popolo alla nazione e dalla nazione allo Stato, nel tentativo convulso e ripetuto di «tenere in sospenso la crisi della modernità», l'impianto teorico ha ceduto e qualcosa è andato perso¹⁰⁵.

Nota positiva in questo quadro apparentemente apocalittico è che quei gruppi, quelle piccole realtà virtuali, hanno alimentato nuove e inimmaginabili dinamiche trans- e sovra-nazionali tra Stati, nazioni e società, stravolgendo il rapporto della nazione col territorio, “deterritorializzando” la nazione. La globalizzazione ha fatto il resto, contribuendo in modo incisivo a rendere tutto questo più immediato e visibile.

Negli ultimi cinquant'anni abbiamo assistito ad una graduale (e virtuale) ridefinizione dei confini, esplosi per effetto di una forse sottovalutata “bomba informatica”¹⁰⁶; abbiamo imparato a convivere con Stati “non-Stati”, usando una declinazione del *non-lieu* di Marc Augé¹⁰⁷, con Stati cioè percepiti come contenitori aperti, come realtà dinamiche, come punti di flusso in cui la scollatura dal sociale, dalla storia, dalla tradizione, dall'identità è sembrata diventare un nuovo fattore caratterizzante. L'esito di questo processo non è stato la fine del territorio o la fine dei confini e della proiezione spaziale del corpo politico, ma «la fine della spazialità sovrana, della sua natura gerarchizzata, esclusiva, coerente»¹⁰⁸. Lo Stato, cioè, ne è uscito “decentralizzato”, tanto che si suole correggere il tiro e parlare, più che di crisi dello Stato, di crisi dello statocentrismo¹⁰⁹. La sovranità si è scomposta e distribuita, nonostante le gerarchie formali, tra una pluralità di attori e forze operanti con notevole autonomia, e ha prodotto una vera e propria “feudalizzazione” del quadro politico-giuridico nazionale e internazionale¹¹⁰. Se a detta di Sandro Mezzadra e Brett Nielson, però, i confini statali sono usciti più forti dalla sfida del globale¹¹¹ e la nazione ha potuto così consolidarsi come «referente rassicurante»

104 Bellini (2011), pp. 89-90.

105 Hardt, Negri (2002), pp. 13 ss.

106 L'espressione è di Virilio (2000).

107 Cf. Augé (2009).

108 D'Andrea (2002b), pp. 103-104; D'Andrea (2002a).

109 Scartezzini (2000), pp. 62-63.

110 Scartezzini (2000), p. 20.

111 «Borders, far from serving merely to block or obstruct global passages of people, money, or objects, have become central devices for their articulation. Borders play a key

per la comunità¹¹², c'è che la sensazione che il «bluff» della nazione ottocentesca sia finito resiste. E resiste già dal 1944, da quando cioè lo denunciava fuori dai denti Gaetano Salvemini¹¹³. La fine di un *bluff* radicalizzata in una più buia «morte della patria»¹¹⁴, in un'epifania complessa che ha portato lo Stato-nazione alla schizofrenia, a reazioni cioè ora isteriche ora paranoiche, volte da una parte all'abbattimento delle frontiere affinché la circolazione di soggetti, beni, capitali e informazioni potesse essere favorita (la linea della «logic of modern science» di Francis Fukuyama¹¹⁵); dall'altra, all'erezione di nuove barriere, di nuove politiche di consolidamento del “proprio” e di controllo dell’ “altro” («the struggle for recognition»¹¹⁶), di contropinta del locale, di tenuta, stabilità e contenimento, al fine di fronteggiare flussi di “parole” e “corpi” estranei sempre più pervasivi¹¹⁷.

Di pari passo, fuori dal contesto d'origine, è finito anche un altro *bluff*, quello degli “Stati nel deserto”, quello delle piccole nazioni, di quelle realtà cioè frutto dei delicatissimi processi di *state building* e *nation making* avviati forzatamente negli anni della decolonizzazione. Fukuyama ha visto in questo fallimento, purtroppo inevitabile a causa dell'uso distorto della forma-nazione tra Otto e Novecento, e irreparabile dall'esterno a causa dell'inconsistenza di una scienza della pubblica amministrazione, la ragione di una serie di fratture e crolli di stabilità geopolitica, di sicurezza e di «considerevoli disastri in campo umanitario» in determinate aree del globo¹¹⁸.

Com'è intervenuta in questi processi la globalizzazione? L'inadeguatezza dell'impianto ottocentesco alle sfide del globale ha imposto una riflessione ulteriore. Al globale, al «pianeta in rete»¹¹⁹ si è provato a rispondere col locale, trasformando quello che prima era il rapporto tra universale e particolare in un'opposizione legata più al linguaggio dello spazio. Il locale, instabile per definizione, è stato alternativamente inquadrato ora in un mero duplicato del

role in the production of the heterogeneous time and space of contemporary global and postcolonial capitalism», Mezzadra, Neilson (2003), p. IX.

112 Thiesse (2001), pp. 11-12.

113 Salvemini, Merola (1967), p. 62.

114 Galli della Loggia (1996), pp. 4-5.

115 Fukuyama (1989), pp. 1-18; Fukuyama (1992).

116 Diffusamente in Fukuyama (1992).

117 Se a questo si aggiunge l'effetto dei flussi migratori, ci troviamo di fronte a un quadro estremamente complesso. Su questi aspetti vedi Meccarelli, Palchetti, Sotis (2012).

118 Fukuyama (2005), pp. 8-9.

119 Augé (2007), p. 9.

globale (diventando il *glocal* di Zigmunt Bauman¹²⁰), di fatto non rilevando e neutralizzando il concetto stesso di frontiera; ora, in elemento perturbante il sistema: in questo caso, agendo dall'esterno, il locale sarebbe stato sanzionato in termini politici attraverso l'esercizio del diritto di ingerenza¹²¹. Parlando di diritto di ingerenza e di annichilimento del locale, viene in mente ancora una volta il fenomeno della colonizzazione. Per Augé il coloniale ha rappresentato una specie di «avvento del globale», proprio sulla scorta di quella persistenza (e azione) del diritto di ingerenza: dopo la colonizzazione non c'è più stata alcuna possibilità di osservare l'evoluzione autonoma di un qualsiasi gruppo umano; «per amore o per forza, – scrive Augé – l'umanità è diventata oggettivamente solidale»¹²², con gli esiti che ne sono derivati. È in questo solco che andrebbe ascritto dunque il fenomeno del globale e in questo senso andrebbero letti i suoi esiti.

Perso quasi del tutto il contatto con la nazione, ciò che permetterebbe di ricostruire un nuovo itinerario di lealtà e appartenenza dal quale ripartire potrebbe essere la civiltà. Riprendendo Samuel Huntington¹²³, Scartezzini ha prefigurato un ritorno alla civiltà. Per il sociologo esisterebbe un doppio livello di lealtà utile a risolvere l'*impasse* della crisi della nazione: per nulla condizionata dallo Stato, la civiltà è l'unica (e l'ultima) visione tanto al di sopra quanto al di sotto degli Stati; permetterebbe ai gruppi substatali che appartengono ad una data area giuridico-politica (cioè ad uno Stato) di richiamarsi a, e considerare come luogo di dislocazione della propria lealtà, una sorta di entità superiore che sarebbe appunto quella della civiltà di appartenenza. In considerazione del fatto che i fenomeni sociali si internazionalizzano sempre di più, e che le persone tendono a rifugiarsi in forme tradizionali di lealtà che riescono a dare loro un senso di identità, la civiltà potrebbe rappresentare, in questa ipotesi, il raggruppamento più ampio in cui una persona possa identificarsi. Individui sparsi per il mondo, appartenenti a Stati differenti, collocati in realtà locali totalmente dissimili, potrebbero sentirsi comunque parte di un tutto, di un "noi", di una comunità culturale più vasta¹²⁴. Scartezzini, sulle orme di Huntington, intravede «un ordine mondiale nuovo» in cui gli allineamenti internazionali avvengono non più tra Stati con interessi di sicurezza

120 Cf. Bauman (2005). Su questo punto rinvio a Augusti (2016).

121 Augé (2009), p. 11.

122 Augé (2009), p. 17.

123 Cf. Huntington (2000).

124 Scartezzini (2000), pp. 50-51.

o materiali simili, ma tra Stati “fratelli”, ossia appartenenti alla stessa civiltà. Una nuova “fratellanza” mazziniana o una suggestiva trasfigurazione della *ummah*, dunque, frutto dell’accresciuta “esposizione interculturale” che non nega l’esistenza degli Stati, ma li supera in un percorso di lealtà più vasto e coerente. In questa lettura, a mediare la complessità dei flussi della cultura globale (“deteritorializzata” anch’essa), non sarebbe più dunque quello Stato che Romagnosi elevava a civiltà¹²⁵, ma l’individuo stesso¹²⁶, proiezione locale della civiltà.

Questa riabilitazione dell’individuo e del locale, però, apre anche ad un’altra riflessione. Se, come ha scritto Nuzzo, si fa pace con l’idea che non esista una civiltà universale, e che lo Stato non sia (o comunque non sia più e soltanto) lo strumento utile per raggiungerne una, si riesce ad ammettere con più onestà che il cosiddetto processo di modernizzazione/occidentalizzazione sia fallito e che, anzi, nei Paesi della “periferia dell’Occidente” si sia teso sempre di più a reagire in maniera negativa ai modelli della sua civiltà, non ultimo quello giuridico-politico dello Stato-nazione. Questo atteggiamento ha innescato una serie di riappropriazioni, spesso distorte, di quelle tradizioni culturali locali, di quelle “lealtà” che i tentativi di transizione verso *la* modernità avevano messo in subordine¹²⁷. All’imperativo di non perdere la propria identità nel “crogiuolo del globale”, si è cioè lentamente ripreso contatto col ricordo, con la memoria, con la storia. La storia, come strumento di contestazione del sistema, ha dato voce al locale permettondogli di rinnovare il suo patto di lealtà. Che sia la civiltà di cui parla Scartezzini, la fratellanza mazziniana, islamica, o altro, resta che se nell’Ottocento si voleva e poteva immaginare il mondo come diviso in «blocchi sistemici contrapposti e difficilmente comunicanti», oggi quei blocchi non esistono più: la “globalizzazione” ci ha posto di fronte a infinite comunicazioni *tra* spazi e all’urgenza di dare voce alle complessità storiche e materiali di quei dialoghi. Ignorare tutto questo significherebbe cadere a pie’ pari in una «trappola cognitiva»; pertanto, accanto a quella storica deve sopravvivere una sensibilità geografica, intesa come capacità di rappresentare e comprendere gli spazi nella loro complessità storica e materiale¹²⁸. Ma non solo. Occorre ripensare la collocazione degli studi

¹²⁵ Vedi qui nota 57.

¹²⁶ Parsi (1998).

¹²⁷ Nuzzo (2013), p. 18, parla di «reinvenzione culturale», di un artificiale ritorno alle fonti realizzato (anche) attraverso «prestiti da fonti esterne».

¹²⁸ Carducci (2014), pp. 2-3.

sulla teoria dei confini, recuperando una riflessione più aperta sul rapporto tra dimensione spaziale e relazioni tra gruppi umani¹²⁹, nella consapevolezza che i confini non abbiano solo una connotazione geografica, ma intima, psicologica, analitica, geoculturale. Un approccio ecologico nello studio dei confini è necessario al fine di considerare l'impatto delle barriere confinarie sulle interazioni tra sistemi sociali¹³⁰. Occorre, in una, coltivare un «pensiero della mobilità»¹³¹, ripensando il concetto di «identità» non come *idem esse*, ma come *id esse*. Questo implica una revisione dell'identità nel contesto politico, determinata dalla «necessaria interferenza di ogni singolo con altri uomini» e dal superamento del momento del conflitto, dello scontro fra la naturale tendenza all'individuale e il bisogno del sociale, «tra solitudine e solidarietà»¹³². Il «momento dialettico» che stiamo vivendo «è forte: stiamo – ieri, oggi e ancor più domani – costruendo qualcosa di sopranazionale»¹³³, ha scritto Paolo Grossi. Questo qualcosa è una nuova identità. «L'identità nazionale¹³⁴ non è qualcosa di stabile, ma è un processo storico che si costruisce e si modifica nel tempo, in relazione a una serie di variabili legate a circostanze precise». Proprio e anche per questo non può essere, oggi più che mai, né un fatto «nazionale» né un'«opera di assistenza e di creazione [sotto il] patrocinio internazionale». L'identità nazionale resta, oggi più che mai, «un processo internazionale»¹³⁵.

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129 Strassoldo (1979).

130 Cf. Deutsch (1966), p. 5.

131 Augé (2007), p. 25.

132 Schiera (2016), p. 265.

133 Grossi (2003), p. 51.

134 Fra i numerosi studi sulla nazione e sulla identità nazionale: Hohn (1945); Hallett Carr (1945); Gellner (1997); Hobsbawm, Ranger (1983); Hobsbawm (1991); Greenfield (1992); Smith (1992); Guiomar (1990); Anderson (2009).

135 Di Ciommo (2005), p. 5.

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MA COS'È QUESTA CRISI?

Carla Canullo

1. Ma cos'è questa crisi?

Nel 1933 il cantautore napoletano Rodolfo Tonino, nome d'arte di Rodolfo de Angelis, scriveva una canzone dal titolo «Ma cos'è questa crisi?». La domanda era il *refrain* della canzone che in alcuni passaggi recitava: «Cavi fuori il portafogli metta in giro i grossi fogli e vedrà... che la crisi finirà!»; oppure «Tutte quante le nazioni si lamentano così, conferenze riunioni ma si resta sempre lì “ah la crisi.....eh!” Ma cos'è questa crisi... ma cos'è questa crisi... Rinunziate all'opinione della parte del leone e chissà... che la crisi finirà!». Infine: «L'esercente poveretto non sa più che cosa far e contempla quel cassetto che riempiva di danar... “ah la crisi signor!” Ma cos'è questa crisi... ma cos'è questa crisi... Si contenti guadagnare quel che è giusto e non grattare e vedrà... che la crisi passerà!». La crisi dalla quale nel 1933 non si era ancora usciti era lo strascico di quella che, iniziata nel 1929, preannunciava in Europa una crisi sociale e politica che, a pochi anni di distanza dalla Grande Guerra, preparava a un'altra e nuova crisi che di lì a poco sarebbe sfociata nel Secondo Conflitto Mondiale. Altre crisi sono accadute portando con sé cambiamenti. Tra queste, la crisi iniziata già da anni e di cui sperimentiamo quotidianamente gli esiti.

Se De Angelis cantava: «Vedrà, questa crisi finirà!», oggi si potrebbe dire che certamente una crisi finisce ma per ricominciare, con conseguenze sempre nuove e inattese. E inattese lo sono perché non sappiamo come essa framerà l'ordine cui siamo abituati e che conosciamo. Il suo tratto distruttore è argomento per economisti, politici ma anche per fisici. O almeno per un fisico, Francesco Sylos Labini che alla domanda: «Ma cos'è questa crisi?» ha risposto individuando quei paradigmi che, a suo avviso, ne sono alla base¹. Citando in più luoghi la domanda che la regina Elisabetta II ha posto agli economisti della London School of Economics, «Why no one saw the credit crunch coming»², Sylos Labini – nei primi capitoli del libro – salda l'analisi economica con i paradigmi matematici e fisici che essa sottende. In breve,

1 Sylos Labini (2016).

2 Riportata in « The Telegraph », 5 novembre 2008.

la sua tesi è che il modello dominante neoclassico e neoliberista si basa su modelli matematici e fisici atti a prevedere e individuare delle costanti. In realtà (ecco la critica di Sylos Labini) tale modello economico, a dispetto del suo preteso poggiarsi su leggi scientifiche stabili, in questi anni ha mostrato la propria debolezza essendo incapace di prevedere l'arrivo di tale crisi. Partendo dalla constatazione che nessuna crisi è stata prevista, l'autore scrive:

Da una parte si potrebbe concludere che i modelli economici su cui sono basate le previsioni non sono capaci di effettuarne di corrette e che dunque necessitano di una rivisitazione fondamentale. Dall'altra parte, secondo la visione neoclassica moderna esposta da Lucas, il motivo del fallimento è intrinseco al modello dei mercati efficienti: se i mercati fossero efficienti e si conoscesse con sicurezza [...] in anticipo quello che succederà nel prossimo futuro, i mercati si modificherebbero proprio per annullare la prossima previsione³.

E poco oltre Sylos Labini, rilevando la banalità delle previsioni degli economisti che pretendono ancora oggi di trattare la crisi come un "fatto prevedibile", scrive che di fatto le previsioni "scientifiche" della crisi si limitano a osservazioni banali, quali: «Ci sarà crescita in primavera»⁴. Se il ricorso a paradigmi fondati sull'equilibrio, seguiti dal modello neoclassico, è del tutto inadeguato a pensare la crisi, la tesi sostenuta dal libro è che soltanto una ricerca veramente innovativa permetterà di trovare spunti altrettanto innovativi e tali da permettere l'uscita da una crisi ormai protratta⁵.

Si potrebbe obiettare a questa lettura, dai toni spesso polemici e che si chiude con una critica al modo in cui in Italia e in Europa è trattata la ricerca⁶, che in realtà le crisi sono prevedibili e gestibili. Se l'obiezione dice il vero (contro l'analisi proposta da Sylos Labini), non resterebbero molte risposte possibili alla "Queen's Question": se le crisi che pesano in modo devastante più sui singoli che sugli Stati sono prevedibili e ciononostante "ci sono" con i loro effetti drammatici, allora sono *volute*. Ovvero: se 1- sono prevedibili e 2- si sa che cosa sono e quali assetti cambieranno due sono le alternative possibili: o 3- chi sa non può far nulla per far sì che non ci siano ma in tal

3 Sylos Labini (2016), pos. 1687. Sylos Labini discute a lungo le posizioni dell'economista Robert Lucas, membro della scuola di Chicago e critico dell'economia keynesiana.

4 Sylos Labini (2016), pos. 1629-1695.

5 Sylos Labini (2016), pos. 1612.

6 Va ricordato che l'autore è membro del comitato di redazione del sito Return on Academic research, <https://www.roars.it/online/>.

caso il ruolo di un simile esperto sarebbe del tutto inutile; o 4- essendo il ruolo dell'economista indispensabile e soprattutto efficace, la crisi prevedibile e prevista è anche una crisi non evitata e, perciò, voluta. E voluta lo sarà non per un'improbabile malvagità di qualcuno ma perché *pochi* e diversi agenti (politici, sociali, culturali, ecc.) decidono che è arrivato il momento di cambiare lo *status* dei più.

Perciò, non volendo seguire l'analisi di Sylos Labini e non volendo sostenere che chi adotta il paradigma economico neoclassico, basato su alcuni modelli di prevedibilità, in realtà non riesca nel suo scopo e compito, e volendo invece perorare la causa degli economisti sostenendo la loro capacità di svolgere adeguatamente e sensatamente il loro lavoro, non restano molte strade da seguire. Questi sanno fare il loro mestiere, sanno prevedere e gestire la crisi, eppure la crisi c'è e cambia l'assetto sociale, crea nuove paure e nuove povertà, come constatiamo da anni. Se chi può fare non fa, allora, non resta molto da congetturare né occorrono menti di spicco per dedurre che costoro vogliono esattamente che le cose stiano così, oppure decidono che "adesso le cose debbono andare così" in funzione della creazione di nuovi ordini e dello spostamento di ricchezze e capitali. Forse qualcuno alla regina Elisabetta II che chiedeva «Why no one saw the credit crunch coming» avrà pur risposto: «Because we had no interest to predict it». Oppure, immedesimandosi con celebri personaggi dello scorso secolo avrà risposto: «Frankly, my dear, I don't give a damn», senza nessuno a dire «After all, tomorrow is another day!» – frase che poco probabilmente leggeremmo sulle labbra di Queen Elizabeth.

Ciò detto, allora, «cos'è questa crisi»? La filosofia, di fronte al quadro appena esposto e che va guardato con sereno disincanto, *apparentemente* non dice nulla di utile limitandosi a constatarne e commentarne i disastri – in termini culturali ma soprattutto *umani*⁷.

2. Inutilità della filosofia?

Una nuova domanda, così, si pone. Non «perché la crisi non è stata prevista?» ma «davanti alla crisi, che cosa si può fare?». E dato che la filosofia ambisce all'universalità e, perciò, parla di tutto, parla anche di crisi e di come

7 Ma l'inutilità della filosofia è soltanto apparente: vi sono importanti riflessioni filosofiche sull'economia, quali quella proposta da Mancini (2014).

stare davanti a essa. Peraltro, in questo caso è del tutto legittimata a farlo, dato che da secoli si parla di crisi della filosofia (che soffre a causa dei colpi inflitti dalla scienza, dalla tecnica, dalle scienze sociali e via dicendo). Oppure, dato che la filosofia è un discorso il cui scopo è “mettere in crisi” quello che si dà per scontato e consolidato, per questa sua specificità si sarà guadagnata il diritto a pronunciarsi “sulla crisi”. Sintetizzando mirabilmente tante osservazioni sul tema, in questo contesto si segnala un libro, ampio ed esaustivo, di Elio Franzini: *Filosofia della crisi*⁸.

Questo libro è uno dei casi in cui il contenuto non rispecchia il titolo. Ci si attenderebbe un libro di etica applicata alla crisi, o di riflessioni sulla crisi, invece le sue pagine si dipanano in una sorta di inconsapevole e involontario dialogo con il libro di Sylos Labini, condotto da un altro punto di vista. Non, tuttavia, il punto di vista umanistico, come si potrebbe pensare, ma il punto di vista della “cosa stessa”, ovvero il punto di vista de “la crisi” come tale. Se chiediamo che cosa sia una crisi riceveremmo in risposta quanto già detto: essa è un momento di rottura, di cambiamento, in cui un mondo affonda e un altro appare. L’idea proposta da Franzini è che tuttavia questo affondare del mondo accade perché si riduce il potenziale della parola “crisi” obiettivandola e riducendola a una *razionalità unilaterale*⁹. Contro un’idea più generale e complessa di crisi, che il libro indaga nella filosofia dell’illuminismo, in Kant ma anche nella fenomenologia (Husserl, Heidegger, Merleau-Ponty e in molti altri autori), Franzini scrive che, dopo essere uscita «dal vocabolario filosofico per entrare in quelli dell’economia, della finanza, della società, della politica, rivelando di essere centrale in tutti i fenomeni della *polis* moderna»¹⁰, la crisi si è lasciata individuare come «processo di semplificazione che omologa, che rifiuta il senso delle tradizioni, una globalizzazione astratta del pensiero che ne annulla le potenzialità simboliche, gli intrecci motivazionali, in sintesi le differenze che costruiscono un’autentica identità e non un simulacro. Crisi – e riguarda forse anche la politica economica – significa imporre un modello e ritenere fallimentari gli atteggiamenti che a esso non si conformano»¹¹.

Potremmo riassumere trivialmente questo pensiero rimarcando che così come, dal punto di vista del paradigma scientifico, Sylos Labini contesta la semplificazione imposta dal modello economico neoclassico a suo dire inca-

8 Cfr. Franzini (2015).

9 Franzini (2015), p. 184, corsivo dell’autore.

10 Franzini (2015), p. 171.

11 Franzini (2015), p. 177.

pace di prevedere e forse anche di vedere la crisi (oltre che di rispondervi), allo stesso modo Franzini contesta la semplificazione che la crisi impone riducendo la complessità che ogni identità è – ma anche la complessità che ogni costruzione sociale è. In altri termini, una crisi “obiettivata”, ridotta a cosa tra le cose, perde il suo legame con il senso della vita, con il rinnovamento che essa permette, con la riscrittura del mondo. Senza ignorare l’ambiguità intrinseca della parola “crisi”, Franzini ne sottolinea allora non soltanto quello che essa fa perdere ma anche ciò che essa rende possibile, ossia quel «superare il fenomeno reale, cercando di viverne l’irrisolta tensione, mostrando la forza infinita di possibilità che anima la realtà in apparenza frammentaria del mondo»¹². Questa forza non si manifesterebbe se essa non fosse l’essere di ogni cosa, e dunque anche della crisi, ovvero quell’essere che la filosofia chiama “ontologia”. A proposito della quale va detto che «è ingenuo ritenere che l’ontologia si riferisca alle cose [...]. È invece, è sempre stata, una *riflessione* sulle cose, di cui si riconosce un “essere”, il cui significato è tuttavia mutevole»¹³. Passo che prosegue così: «L’ontologia è l’interrogazione su come sia possibile rendere conto della nostra credenza nella realtà del mondo esterno senza ridurla a un’operazione irrazionale, ma ancorandola al modo stesso di manifestarsi, alle regole che governano l’apparire delle cose»¹⁴.

Perciò, ossia perché le cose *sono* quando e nella misura in cui appaiono, «i fatti non si affermano da sé, ma sono portati alla luce, con il loro senso e le loro strutture, nel quadro di un processo, di un percorso, di una genesi, di operazioni soggettive che ne colgano le varie prospettive, che vengono alla luce soltanto se, corrispettivamente, mutano anche i punti di vista»¹⁵. Ed essendo anche la crisi un “fatto”, offrirne una prospettiva che la riporti soltanto alla sua descrivibilità oggettiva significa ridurla e, perciò, perderne la sua natura di “fatto *per* qualcuno”. Ridurla a “esperienza naturalistica” e oggettiva significa perdere completamente l’impatto che essa ha in ciascuno.

Ché questo è veramente il punto della questione concernente la crisi. Nel precedente paragrafo è stata seguita la critica di Sylos Labini che contesta la capacità del modello univoco neoclassico di “spiegare” crisi. Alla fine del suo libro egli propone la vitalità della ricerca (in ogni campo, da quelli scientifici a quelli umanistici) quale possibile volano per attraversare la crisi. Anche

12 Franzini (2015), p. 189.

13 Franzini (2015), p. 123.

14 Franzini (2015).

15 Franzini (2015), p. 39.

se questa è voluta per cambiare l'assetto globale, le risorse con cui ciascuno affronta la realtà – anche e soprattutto quando questa si trasforma – non dovrebbero mai mancare. E tali risorse sono “del soggetto”, non dell’“oggetto”, il che ci riconduce nei pressi della proposta di Franzini: la crisi non è univoca, non si dice in un solo modo ma in molti modi, dove questi modi non sono soltanto i suoi aspetti oggettivi (crisi culturale, politica, economica, finanziaria...), ma quegli aspetti che la percezione umana ne coglie.

La domanda che apre queste pagine, «Ma cos'è questa crisi?», lungi dall'essere una provocazione o un ironico rimando alla canzone di De Angelis, finisce con l'indicare questo: siamo proprio sicuri di sapere che cosa sia la crisi? Nessuna descrizione intelligente e analitica della crisi sarebbe mai capace di ridurre il carico di dolore che l'affondarsi di una realtà morente porta con sé, né potrebbe fare altro dal tacersi davanti al disperdersi di nuove energie e davanti al naufragio di generazioni, cosa di fatto inevitabile. È inevitabile, cioè, che chi può fare e decide di non fare non si preoccupi per chi in questa situazione perisce e affonda anziché ricominciare. Avanzare ricette etiche e proposte edificanti, in tal senso, è del tutto inutile, e significherebbe aggiungere un capitolo alla lunga serie di litanie ascoltate in questi anni. Quello che si può fare e che ciascuno può fare, però, è seguire l'invito di un altro filosofo, John R. Searle, a “vedere le cose come sono”¹⁶.

3. “La” crisi: che oggetto è, costei?

Tra i filosofi grati alla posterità che li ha resi celebri, togliendoli da un inevitabile oblio, va certamente annoverato Carneade. Filosofo greco della corrente degli scettici, sarebbe meno noto di molti nomi illustri della filosofia antica ed ellenica se Alessandro Manzoni non avesse aperto l'ottavo capitolo de *I promessi sposi* con la celebre esclamazione di don Abbondio «Carneade! Chi era costui?». Quanto fin qui detto della crisi ripete questa celebre esclamazione, tanto essa è *difficilmente prevedibile* e, al contempo, polivoca. Infatti, per i più è imprevedibile, altrimenti non godrebbe del suo devastante effetto-sorpresa, ma chi la conosce la cerca per gestire il transito che provoca; inoltre essa si dice in molti modi. Ma che cosa diciamo, *quando ne parliamo*?

Vi è un primo livello, semplice, quello per cui attribuiamo la crisi a qualcosa o qualcuno, come diciamo che un uomo o una donna stanno attraversando

¹⁶ Mi riferirò al testo di Searle (2016).

una crisi di mezza età, o come quando diciamo che un matrimonio è in crisi. O anche, come quando parliamo di “crisi di governo”. Diverso è il livello di cui abbiamo detto fin qui, che concerne “la” crisi *en tant que telle*, ossia questo sostantivo che, come un Convitato di Pietra, in questi ultimi anni ha riempito le pagine dei quotidiani di tutto il mondo, dalla crisi dei mutui *subprime* statunitensi in poi. Questo è un livello diverso perché facciamo della crisi “qualcosa”, un oggetto di cui parlare. Ma siamo sicuri che le cose stiano così e che, invece, la crisi non sia proprio ciò che Carneade era per don Abbondio, ossia una sconosciuta? Insomma: di che cosa parliamo quando parliamo *de “la” crisi*? John R. Searle, noto per le sue teorie linguistiche, innanzitutto per quella conosciuta come la *Speech-Act Theory* (1969)¹⁷, anni dopo le tesi che lo hanno reso celebre scrive *The Construction of Social Reality*, apparso nel 1995, dove avanza alcune tesi che, fermo restando il fatto che sia impossibile rispondere univocamente alla questione «ma cos’è questa crisi?», offrono prospettive per cogliere il suo senso insieme “oggettivo” e “soggettivo”. Detto altrimenti: aprono squarci sul suo senso oggettivo e sulla sua percezione soggettiva, poiché la crisi prevista o analizzata non è la crisi *vissuta*. La destabilizzazione del contesto noto e conosciuto, infatti, alimenta paure e precarietà, altera la percezione della realtà facendone cogliere un’instabilità ignorata a causa del fatto che ogni ordine sembra avere un che di eterno. E sebbene quest’eternità non sia il suo tratto vero (basterebbe una rapida riflessione sulla dimensione temporale e finita di ogni questione umana a confermarlo) ciononostante esso è percepito *così*.

Ora, presentificare ogni ente universalizzandolo è una caratteristica che la filosofia ha da sempre praticato (sebbene anche altre scienze abbiano ceduto a questa tentazione). Tuttavia, dalle ceneri di una metafisica eternizzante l’essere di ogni ente e di tre enti in particolare (Dio, anima, mondo, ossia i tre “oggetti” che la *Schulmetaphysik* ha stabilito) è nato un sapere ermeneutico e interpretante che, a partire da *Sein und Zeit* di Martin Heidegger (1927) ha riflettuto sulla *Endlichkeit* dell’uomo e sulla linguisticità di ogni dimensione umana. Pur senza reclamare la discendenza dall’ermeneutica, anche Searle ha rimarcato questa dimensione linguistica, temporale e finita di ogni ente umano, spingendosi fino alla questione della possibilità di costruire “oggetti sociali”, o “fatti sociali”. Sfruttando questo felice lemma, che spiegherò e chiarirò qui di seguito, pongo subito la questione nella quale vorrei contestualizzare “la crisi”, questo strano “oggetto” di cui si parla senza saper bene *di che*

17 Cfr. Searle (1969).

cosa si stia parlando; questo oggetto che si sa ma che, più lo si conosce, più sembra mantenere risorse che resistono a facili analisi. La tesi che propongo, allora, è la seguente: *tale indecidibilità della crisi (oscillante tra dimensione oggettiva e soggettiva, tra rischio e potenziale) appartiene alla sua socialità e istituzionalità*. Essa, in altri termini, è un “oggetto” o “fatto” sociale, motivo per cui è contemporaneamente oggettiva e soggettiva, “cosa” e percezione.

Se ciò non fosse, non si capirebbe perché in questi anni abbia trascinato con sé tante conseguenze sociali e politiche che fanno parlare di emergenze di nuovi diritti, o di nuovi assetti politici. Se, cioè, “la crisi” si limitasse a essere “un qualcosa di determinato” non si capirebbe come mai sia stata capace di cambiare tanto, se non addirittura tutto un assetto globale. Infatti, nessun “oggetto determinato” sarebbe capace di estendere la propria sfera di influenza in settori tanto distanti tra loro. Inoltre, se fosse un “oggetto determinato”, non si capirebbe come mai non si limita a sconvolgere l’ordine al quale appartiene e che rovescia, generando invece nuove paure, diffidenze e reclamando anche nuove azioni non soltanto economiche ma anche politiche e giuridiche. Se questo è vero e può esser affermato, allora anche il suo *status* deve essere ridetto, e la domanda «Ma cos’è questa crisi?» è tutt’altro che risolta.

Fatta questa constatazione, ripropongo l’ipotesi già avanzata: la crisi “è” (indecidibile) e “fa” (ovvero: sconvolge e apre nuove realtà) perché è un “oggetto” o “fatto” sociale. Ovvero: *essa appartiene a pieno titolo alla costruzione della realtà sociale*. Prima di dire perché, va però chiarito il senso che Searle assegna a questi lemmi. Il filosofo parte da una distinzione generica e generalmente condivisibile: i fatti e le cose si distinguono in oggettivo e soggettivo e tale distinzione ha un senso sia epistemico, sia ontologico. Se «parlando epistemicamente “oggettivo” e “soggettivo” sono principalmente predicati di giudizi»¹⁸, quando noi parliamo di giudizi soggettivi «intendiamo dire che la loro verità o falsità non può essere stabilita “oggettivamente” perché la verità o falsità non è semplicemente una questione di fatto, ma dipende da certi atteggiamenti, sentimenti e punti di vista di chi esprime il giudizio e di chi ascolta»¹⁹. Che il confine tra queste diverse realtà sia labile e che l’una sfoci spesso nell’altra può essere quotidianamente constatato. Ad esempio, «l’asserzione “Il monte Everest è più bello del monte Whitney” riguarda entità ontologicamente oggettive, ma svolge un giudizio soggettivo nei loro confron-

¹⁸ Searle (2006), p. 14.

¹⁹ Searle (2006), p. 14.

ti»²⁰. Invece, l'asserzione «“adesso ho un dolore al fondoschiena” riferisce un fatto epistemicamente oggettivo nel senso che esso è reso vero dall'esistenza di un fatto effettivo che non dipende da nessun atteggiamento, attitudine o opinione di osservatori»²¹. Tuttavia, prosegue Searle, «il fenomeno stesso, il dolore reale, ha una forma di esistenza soggettiva»²², tanto è vero che ognuno possiede una diversa soglia del dolore e, soprattutto, nessuno può dire di “vedere” il dolore allo stesso modo in cui vede il monte Everest. Eppure il dolore resta un “fatto” constatabile che domanda interventi (la cura).

Posta questa prima e generica distinzione, Searle si chiede se anche per fatti sociali da tutti condivisi si possa dire lo stesso, e la sua risposta è affermativa. Infatti, oltre a tutti i fatti che ciascuno (oggettivamente o soggettivamente) può censire, vi sono “fatti istituzionali”, ossia fatti o oggetti che tutti condividiamo *per convenzione*, che non sono “cose” pur possedendo un *valore reale*. Una prima distinzione che il filosofo americano introduce per affermare l'esistenza di questi “oggetti” è la differenza tra regole “regolative” e “costitutive”. Tra le prime si annovera ad esempio la regola della guida, a destra o a sinistra, che, però, non dice nulla rispetto al guidare. Quest'azione, infatti, preesiste o esiste indipendentemente dalla regola di guida, la quale può variare. Invece, «le regole degli scacchi non regolano un'attività antecedentemente esistente. Non si dà il caso che ci sia un mucchio di gente che ordina pezzi di legno sui tavoli, e allo scopo di impedire che si urtino l'un l'altro tutto il tempo e creino ingorghi, si sia dovuto regolare la loro attività. Piuttosto, le regole degli scacchi creano la possibilità stessa di giocare a scacchi. Le regole sono *costitutive* degli scacchi, nel senso che giocare a scacchi è costituito in parte dall'agire in accordo con le regole»²³. Ora, che vi sia la possibilità di “enti” e “fatti” che preesistano a un accordo collettivo (si guida indipendentemente dal fatto che ciò accada a destra o sinistra) e, viceversa, che vi sia un'intenzionalità collettiva che si accorda nel riconoscere il valore oggettivo di qualcosa (giocare a scacchi significa riconoscere tutti insieme che il gioco si chiude con lo *scacco matto*) e porre la distinzione tra regole costitutive e regole regolative, sono gli elementi alla base della “costruzione della realtà sociale”²⁴.

Per rendere meno astratto il discorso di Searle è utile andare subito a un

20 Searle (2006), p. 15.

21 Searle (2006), p. 15.

22 Searle (2006), p. 15.

23 Searle (2006), p. 37.

24 Cfr. Searle (2006), p. 39.

esempio di tale costruzione, il denaro, che l'autore descrive attraverso alcune caratteristiche che si impongono per la loro evidenza e permettono di parlare di realtà sociale. Mi limiterò a elencarle con rapida spiegazione, essendo veramente "evidenti". 1- L'autoreferenzialità di molti concetti sociali: «Se tutti pensano sempre che "qualcosa" sia denaro e la usano e trattano come denaro, allora è denaro. Se nessuno pensa mai che questo tipo di cosa sia denaro, allora non è denaro»²⁵. Questa citazione basta a chiarire l'autoreferenzialità del sistema sociale, ché l'esempio del denaro e delle sue "regole" è chiaro a tutti. 2- L'uso degli enunciati performativi nella creazione di fatti sociali. Se dico o scrivo: «"Lascio tutti i miei beni a mio nipote" o "Con questo la guerra è dichiarata" [...], questi enunciati creano lo stato di cose che essi rappresentano; e, in ogni caso, lo stato di cose è un fatto istituzionale»²⁶ (ovvero: non è il monte Everest). 3- La struttura gerarchica dei fatti bruti e dei fatti istituzionali: «I fatti sociali in generale e i fatti istituzionali in particolare sono strutturati gerarchicamente. I fatti istituzionali esistono, per così dire, al di sopra dei fatti bruti. Spesso i fatti bruti non si manifestano sotto forma di oggetti fisici ma sotto forma di suoni provenienti dalla bocca della gente o come segni sulla carta, o anche come pensieri»²⁷. Poco importa che il denaro siano *fiches*, banconote, metallo o pietre (diamanti?), o che sia in forma di tracce magnetiche: l'importante è che esso si manifesti sia in forma *fisica* (fatto bruto), sia in quanto *denaro* (fatto istituzionale). Oggettivo e istituzionale, dunque, non si escludono a vicenda ma si "gerarchizzano". 4- Si danno relazioni sistematiche tra fatti istituzionali: così come i fatti oggettivi non sono isolati, anche i fatti sociali si costituiscono in una rete di relazioni che coinvolgono vari ambiti. L'esempio del denaro potrebbe essere declinato, anche in questo caso, in tanti e differenti contesti, da quello economico e politico (le riserve degli Stati, i loro bilanci, ecc.) ad ambiti più genericamente sociali. 5- Si dà il primato degli atti sociali sugli oggetti sociali, dei processi sui prodotti: si è sempre tentati, scrive Searle, «di pensare gli *oggetti sociali* come entità che esistono indipendentemente e in analogia con gli oggetti studiati dalle scienze naturali»²⁸. Invece, «gli oggetti sociali sono sempre [...] costituiti da atti sociali e, in un certo senso, l'oggetto è soltanto la possibilità continua dell'attività. Un biglietto da venti dollari, per esempio, è una possibilità sussistente di

²⁵ Searle (2006), p. 41.

²⁶ Searle (2006), p. 43.

²⁷ Searle (2006), p. 44.

²⁸ Searle (2006), p. 45.

pagare qualcosa»²⁹. 6- Ultimo punto, la componente linguistica di molti fatti istituzionali. Questo punto, centrale per ogni discussione sulla “costituzione” degli oggetti sociali, chiederebbe una conoscenza o, almeno, una sommaria esposizione dei capisaldi della *Linguistic Turn* di cui anche Austin e Searle sono stati protagonisti. Essendo ciò impossibile nel presente contesto, mi limiterò a questa osservazione: il linguaggio, con la sua valenza metaforica, è costitutivo, almeno parzialmente, di fatti sociali, come quando leggiamo che «certe colonie di formiche hanno schiavi o che gli alveari hanno regine»³⁰.

L'ultimo passaggio che vorrei segnalare per passare poi alla possibilità di intendere la crisi come oggetto sociale (cosa che, va precisato, Searle non ha fatto), è un punto a mio avviso centrale che l'autore svolge parlando di intenzionalità collettiva che conduce all'oggetto sociale. Gli esempi che adduce sono il denaro e i confini fatti con una successione di pietre, e dunque quei confini che delimitano prevalentemente la proprietà (pubblica o privata). Poiché del primo ho già detto, mi limito al secondo esempio, introducendolo con una rapida osservazione: «La forma più semplice del fatto sociale implica forme semplici di comportamento collettivo»³¹. Immaginiamo, riassumo il testo, una tribù primitiva che marchi il proprio territorio con un muro che protegga la loro *privacy*. Da barriera fisica, nel tempo il muro diventa barriera simbolica riducendosi a una fila di pietre. Ma

si immagini che gli abitanti e i loro vicini continuino a *riconoscere* la fila di pietre come ciò che demarca i confini del territorio in modo tale da influenzare il loro comportamento. Per esempio, gli abitanti attraversano il confine solo seguendo speciali condizioni, e gli estranei possono entrare nel territorio solo se ciò è accettabile per gli abitanti. La fila di pietre ora ha una funzione di indicare qualcosa al di là di se stessa, cioè i limiti del territorio. La fila di pietre svolge la medesima *funzione* di barriera fisica. Non lo fa, però, in virtù della sua costruzione *fisica* ma perché le è stato assegnato collettivamente un nuovo *status*, quello di demarcatore di confini³².

Poco oltre Searle scrive che «l'elemento chiave nella mossa dall'impostazione collettiva di funzione (che potrebbe caratterizzare anche la demarcazione del territorio degli animali, ndr.) alla creazione di fatti istituzionali è l'impostazione di uno *status* riconosciuto collettivamente a cui è connessa

29 Searle (2006), p. 46.

30 Searle (2006), p. 46.

31 Searle (2006), p. 47.

32 Searle (2006), p. 49.

una funzione»³³. È il motivo per cui a un “oggetto” attribuiamo un grande valore al punto di volerne possedere sempre di più. Il denaro, non a caso, è l'esempio che Searle fa dopo essere arrivato a questo punto.

Queste tesi, giustamente molto celebri, andrebbero seguite in tutte le loro movenze e, anche, discusse e criticate, ma – di nuovo – non è questa la sede. Tuttavia, l'intuizione di fondo che l'autore ha avuto aiuta a comprendere “che genere di cosa sia la crisi”. Questa, come altri oggetti sociali, è *autoreferenziale* perché sia che si tratti della “cosa” che è in crisi (matrimonio, governo, ecc.), sia che si tratti de “la” crisi, quest'ultima può essere descritta al suo interno, per così dire, come qualcosa di individuabile “in quanto crisi”. Ovvero: vi sono delle caratteristiche de “la” crisi che ce la annunciano e la fanno riconoscere come tale. E dato che non siamo la prima epoca storica *di crisi*, nella quale cambiano i sistemi di lavoro ed economici, oggi come un tempo possiamo individuare la costante autoreferenziale della *crisi* nel fatto che

- 1- *qualcosa cambia – perlopiù in modo destabilizzante*.
- 2- È performativa in quanto “fa quello che dice” o anche: è riconosciuta quando la si afferma, essendo stata annunciata attraverso una serie di *enunciati che ci hanno detto che stava accadendo* prima ancora che i suoi effetti diventassero concreti (solo gli addetti ai lavori, anni fa, avevano intuito quello che sarebbe accaduto in seguito alla crisi dei mutui *subprime* statunitensi).
- 3- Si caratterizza per un singolare intreccio di affermazioni e fatti concreti.
- 4- Provoca un effetto di cambiamento evidenziando l'interazione di diverse sfere sociali – e soprattutto portando alla luce *quelle differenze sociali che non erano più percepibili*.
- 5- Si caratterizza per la stretta relazione tra atti e fatti sociali, tanto è vero che si definisce in quanto rottura di uno *status quo* e si afferma provocando “cose nuove” – non necessariamente soltanto negative o soltanto positive.
- 6- Possiede evidentemente una forma linguistica: anche se nessuno vede la crisi perché se ne vedono soltanto i suoi effetti, noi continuiamo a *parlare* “della crisi”. Perciò, così come concordiamo sul valore del denaro e dei confini, concordiamo tutti intenzionalmente sul fatto che la crisi *c'è* – anche se nessuno l'ha mai vista come può dire di aver visto il monte Bianco. Ciononostante *c'è*, è un *fatto sociale che cambia e ha cambiato la situazione politica, economica e sociale in cui viviamo*, anche se non la si vede in quanto “crisi” (così come vediamo altre cose); per questi motivi, essa è un fatto e oggetto sociale che interroga e interpella. Soprattutto, essa – *invisibile* – determina la nostra *percezione delle cose visibili*.

33 Searle (2006), p. 51.

È di nuovo Searle a riprendere il tema della percezione – evidentemente *soggettiva* – in relazione ai fatti “oggettivi” e “sociali”. Mi limiterò a questa sua osservazione: «C’è un’esperienza visiva ontologicamente soggettiva che esiste interamente come un’entità “privata” nella testa dell’agente che percepisce e c’è un’entità ontologicamente oggettiva e “pubblica” nel mondo al di fuori della nostra testa. Come può la descrizione essere la stessa? [...] (Lo è perché) la descrizione del contenuto della presentazione deve corrispondere allo stato di cose che costituisce le sue condizioni di soddisfazione nel mondo esterno»³⁴. Ciò che Searle non si stanca di ripetere è che «i contenuti nella testa (*scilicet*: le nostre percezioni) sono presentazioni intenzionali delle condizioni di soddisfazione, e quelle sono gli oggetti nel mondo che io vedo. Qualsiasi teoria della percezione deve spiegare questa comunanza»³⁵. Ma c’è di più. Oltre a dovervi essere una corrispondenza che verifichi la conformità tra ciò che crediamo e percepiamo e la realtà, niente si dà senza uno sfondo dal quale emerge (e dunque i dati sensoriali si danno sempre anche con e in uno sfondo che li precede), il che non ci esime dal dover *imparare a vedere* quello che appare, come alcune celebri immagini (ad esempio l’anatra-coniglio di Joseph Jastrow³⁶) mostrano. Se per un verso non possiamo né dobbiamo rinunciare alla realtà, dall’altra parte nessuna realtà si dà se non in uno sfondo e a un soggetto che, però, deve imparare a guardarla. Se, allora, la crisi è un oggetto sociale che non essendo al modo delle “cose naturali” si mescola alla nostra percezione della realtà, resta soltanto da dire che cosa possa voler dire “percepire la crisi”.

4. Ah! La crisi...

Riparto dalla “Queen’s Question”, ponendola come obiezione a queste ultime osservazioni: se la crisi è un particolare “oggetto sociale” che si distingue per delle caratteristiche sulle quali tutti concordano, perché non è stata prevista e ancora non è risolta? Alla questione della previsione si risponderà come già risposto, ossia che poteva essere prevista ma che ciò non è avvenuto, non per malvagità o incuria ma per scelte compiute da agenti (impiego qui il termine di Searle) che potevano e volevano compierle. Ma la questione non

³⁴ Searle (2016), p. 65.

³⁵ Searle (2016), p. 71.

³⁶ Searle (2016), p. 80.

si limita a questo aspetto che rientra, per così dire, nel quadro della “storia” e delle vicende delle nazioni – così come vi rientra la cosiddetta “globalizzazione”. Se, allora, non si tratta di mettere in discussione un “oggetto sociale” che (comunque e malgrado tutto) c’è, che cosa resta da fare? Forse, sperare che alcune menti sensibili continuino a formare le coscienze mostrando che nessun sistema economico è *assoluto*, sciolto da ogni condizione, e continuino a sollecitare lo spirito critico di chi non partecipa alle grandi decisioni – e anzi le subisce. Già questa consapevolezza che, forse, nel tempo porterà all’assunzione di modelli economici diversi, è più di niente. Essa riguarda, tuttavia, un unico tratto dell’“oggetto sociale”, *il suo tratto oggettivo*, e non tiene conto dell’altro versante della questione, quello soggettivo.

Infatti, se ogni “oggetto sociale” si distingue per il proprio carico di oggettività e soggettività, di linguisticità e fatticità, ecc., e se la realtà si rivela *anche* in una percezione, *allora* – per e grazie a questo elemento “soggettivo” – anche altro si può fare. In quanto “oggetto sociale”, “la” crisi è oggetto da tutti riconosciuto ma non ineluttabile. È un oggetto come il denaro o il confine, o il monumento o la bandiera. Certo, l’impoverimento che ha portato, in questi anni, è notevole, ma peggiore di tale impoverimento è la paura e il senso di precarietà che arreca con sé. Peggiore della realtà che cambia (non in meglio) è la sua *percezione* perché percepire che il cambiamento imposto è ineluttabile, l’incapacità di comprenderlo e la paura che ne consegue, insieme a tanti altri fenomeni sociali che abbiamo riscontrato questi anni, blocca in una situazione inevitabilmente mutata e impedisce di cogliere che una rottura è tale in riferimento a un ordine che non c’è più ma rispetto al quale qualcosa di nuovo s’avanza. La percezione, Searle lo diceva, ma anche Merleau-Ponty e altri autori nel secolo scorso lo hanno rimarcato, è il modo in cui entriamo in contatto con la realtà, è il tramite con cui un fenomeno manifesto si fa evidente *per* noi. Sottolinearlo e capirlo, però, non significa che quel fenomeno ormai manifesto sia del tutto ineluttabile e inaggirabile. O almeno, se “oggettivamente” lo sembra, “soggettivamente” rimane tutto lo spazio per seguire le tracce del cambiamento, per l’appello alla creatività e al rinnovamento, per l’invito a stare nella situazione non come “cosa tra le cose” (dato che neppure la crisi lo è!) ma con tutto il carico che la creatività della percezione “soggettiva” rende possibile.

Percepire significa dare un peso di valore e di realtà all’oggetto, tanto che una serie di pietre (che non è altro da una successione collocata sul terreno) diventa altro, ossia la delimitazione di una proprietà o di un confine. Ma chi,

se non il “soggetto”, è capace di quest’individuazione? E se il soggetto è stato capace di questa creatività – ossia cogliere nelle pietre più di quello che esse sono e farne un fatto sociale da tutti soggettivamente condiviso – potrà essere ancora capace di *reinvestire* tale percezione della realtà nel vedere i molti aspetti che il cambiamento della crisi arreca – da punti di vista e in ambiti diversi.

Un re-investimento della percezione che va declinato come riconoscimento di nuove emergenze in ambito politico, economico e sociale *sapendo* che a essere in gioco è la costruzione di una *nuova* realtà sociale. Allora il compito di ogni sapere, sia esso “umanistico” o tecnico, potrà valorizzarsi nel reciproco convergere di intenti.

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THE PROBLEM OF DEMOCRACY

DEFENDING COLLECTIVE SOCIALITY:
THE ORESTEIA AT SHAKESPEARE'S GLOBE

Louise Owen

"There's more than one way to rebuild a haunted mansion."¹ So begins *New York Times*' theatre critic Ben Brantley's review of two recent British adaptations of Aeschylus' ancient trilogy *The Oresteia*, whose London productions appeared one after the other in summer 2015. The first, entitled *Oresteia: Aeschylus: a new version created by Robert Icke*, was directed by its author to great critical acclaim at the Almeida Theatre in north London. Next came *The Oresteia: adapted by Rory Mullarkey from the original by Aeschylus*, directed by Adele Thomas at Shakespeare's Globe, the late twentieth century reconstruction of the early modern theatre located on the South Bank of the Thames. Brantley's 'haunted mansion' metaphor refers to two aspects: the place of these differing interpretations in the trilogy's extensive production history, and to its plot, whose three parts trace the unfortunate story of the cursed House of Atreus. Icke's adaptation presented the travails of its powerful family in a sleek and minimal contemporary setting. Meanwhile, Mullarkey and Thomas' slow and disquieting production was otherworldly. Though it was also very well received, its chosen strategy of aesthetic anachronism, bringing historical periods into dialogue, baffled some critics and audiences.² Here, I argue that *The Oresteia*'s anachronistic approach, pursued in the environs of the rebuilt Globe, represented an astute theatrical response to the European crisis and the context of continued austerity in Britain. Its theatrical images and sense of prolonged, elongated time cultivated through its pace subtly reflected on the historical dimension of present experiences of crisis. And, taking advantage of the space of the Globe, it meditated on the constitution of the collective social body as *demos* – a contested construct I define broadly here, along with Wendy Brown, as "democratic citizenry".³

1 Brantley (2015).

2 Speaking of his translation, Rory Mullarkey says: "I feel like Aeschylus himself was relatively anachronistic, he switched between archaisms and neologisms and colloquialisms. I guess I wanted it to feel like there was a sense of anachronism running through it." Bano (2015).

3 Brown (2015), p. 65. Brown surveys debates concerning the definition and substance of the *demos* in writings by Agamben, Rancière and Balibar, concluding that for her

The punishing effects of policies of austerity, enacted in Britain since the election of the Coalition government in May 2010, informed the development of *The Oresteia*. Thomas explicitly stated her utopian aim as to treat the Globe as “a spiritual and even ritualistic space, but also a space of community, of political expression”.⁴ In a public talk with Mullarkey at the University of Oxford in November 2015, she reflected on the political and economic situations in Greece and her own Welsh hometown, and their influence on the production, commenting that “what’s going on at the moment was at the forefront of our minds, and that chimed I guess to some degree with the feeling of the world [of the play] being slightly shut down or in flux”.⁵ The production was also inflected by immediate political events. The show’s run commenced in late August 2015, as headlines continued to address various responses to austerity: lawyers’ demonstrations against cuts to legal aid in Britain, the fallout from Greece’s ‘no’ vote in the EU bailout referendum, and huge turnouts to public meetings staged as part of Jeremy Corbyn’s Labour leadership campaign. The production thus took place in the context of an upsurge of support for social democratic alternatives to austerity, and struggles to defend them. When I saw the production live, I was unable to disentangle it from current events, in particular the legal aid protests. Of course, the production had entered into development many months before, but in performance its attention to justice and revenge became accentuated by the events unfolding around it in ways that were not shared by the Almeida production. The visual, aural and sensorial approach taken in Thomas’ staging, and its concomitant play with historical time, emphasized aspects of the European crisis and the constitution of collective sociality in a manner that the material specificities of Shakespeare’s Globe were uniquely able to provide.

The three plays that make up Aeschylus’ *The Oresteia* tell a violent tale of blood vengeance displaced by trial by jury. The first play, *Agamemnon*, describes the slaughter of its eponymous protagonist by his wife Clytemnestra. She exacts furious vengeance upon her husband, returned to Argos from the Trojan War with captured slave Cassandra, for his sacrifice of their daughter Iphigenia ten years before, done strategically to assuage the anger of the

project “the open and contestable signification of democracy is essential to this work because I want to release democracy from containment by any particular form while insisting on its value in connoting political self-rule by the people, whoever the people are” (p. 20).

4 Tonkin (2015), p. 44.

5 *The Oresteia at the Globe Theatre* (2015).

wronged goddess Artemis and to assure military success. Next, in *The Libation Bearers*, Agamemnon and Clytemnestra's son Orestes returns from exile to avenge his father's murder, killing his mother and her lover Aegisthus, who have seized control of the city. The final play, *The Eumenides*, dispatches the cycle of blood vengeance by submitting Orestes' crime to a trial by jury, where Orestes is required to defend his violent retaliation against his mother. The trial is presided over by the goddess Athena – with a jury performed, in the Globe's production, by members of the amateur Borough Market Choir. This play also sees the suppression of the Furies, goddesses of vengeance and defenders of the murdered mother Clytemnestra, who find themselves literally pushed to a domain beneath the ground. The principles of abstract justice and due process which replace blood vengeance are commended by Athena, in Mullarkey's version, as “a new evolving system / Which works for everyone, for those in charge / And those most vulnerable in society”.⁶ Aeschylus' plays seem to endorse both René Girard's theorization of the “self-propagating”⁷ characteristics of violence, where violence inevitably begets further violence, and his thoughts, in *Violence and the Sacred* (1972), regarding the modern judicial management of violent revenge. Girard writes that “public vengeance is the exclusive property of well-policed societies, and our society calls it the judicial system”;⁸ he theorizes its effect as curtailing the cyclical, private execution of vengeance. Applying Girard to Aeschylus, George Newtown reads *The Oresteia* as chronicling “the mythic quantum leap of the Athenian Greeks as they replaced sacrificial ritual with judicial law as a preferred means of controlling violence”.⁹ Yet, despite Athena's claim in Mullarkey's version regarding the universality of the new democratic system of justice, the structural transformations the trilogy narrates are highly gendered. As such, as a canonical drama, as Newtown argues, *The Oresteia* threatens to “sanctify gender, ethnic, and class inequities well into the future in societies that revere the artwork as an iconographic text”.¹⁰

Both writer and director were acutely conscious of *The Oresteia*'s politics, and worked to present a feminist production. Throughout, their version of the drama was keenly attentive to *The Oresteia*'s inequalities, injustices and

6 *The Oresteia*, Adapted by Rory Mullarkey (2015), p. 105.

7 Girard (2005), p. 27.

8 Girard (2005), p. 16.

9 Newtown (1999), pp. 135-146 (p. 136).

10 Newtown (1999), p. 145.

contradictions. Thus, its powerful Clytemnestra, in anguish at the loss of her daughter, was also figured as an agent of asset-stripping autocracy in cahoots her lover Aegisthus. As their grip on the state tightened as the drama unfolded, the power dynamic between the two subtly tipped away from Clytemnestra. Mullarkey's Cassandra describes the actions of the god Apollo, the backdrop of her capture by Agamemnon, in uncompromising terms:

Yes, I hope my debt is paid to you now, great Apollo.
 You raped me and then saw me raped and raped,
 You stood by the razing of my city,
 And at the gutting of my family,
 And instead of letting me die at home,
 You bring me here to face this butcher's block,
 Wet with the blood of my fresh-slain conqueror.¹¹

Mullarkey remarked upon his sudden awareness as the text's translator, during the final performance of the run, of "something that I've somehow osmosed from the Greek: almost every single line has something about 'man' or 'woman', and what that means".¹² In performance, the final act of the production strongly asserted the phallocratic underpinnings of supposedly abstract justice. Speaking on behalf of the defendant, Apollo dismisses the female body as "just a vessel"; in casting her own vote to acquit Orestes, Athena confirms that "though a female being, I am my father's child / And so side with the avenger of his father".¹³ Athena exhorts the vanquished Furies to "swell on your new thrones, all purple-dyed / With manly excellence and civic pride".¹⁴ And, as part of the ritual dance that concludes all Globe productions, the audience enjoyed a huge burst of golden confetti and a concluding Dionysian pro-democracy pageant featuring a gigantic golden winged phallus – a finale intended to produce a discomfiting sense of "triumph".¹⁵ While audiences responded in a range of ways, Thomas hoped primarily that this moment would register as "unsettling, because I find the dominance of the patriarchy at the end of the play really terrifying".¹⁶ The feminist significance

11 *The Oresteia*, Adapted by Rory Mullarkey (2015), p. 37.

12 *The Oresteia at the Globe Theatre* (2015).

13 *The Oresteia*, Adapted by Rory Mullarkey (2015), pp. 104-105.

14 *The Oresteia*, Adapted by Rory Mullarkey (2015), p. 110.

15 *The Oresteia at the Globe Theatre* (2015).

16 *The Oresteia at the Globe Theatre* (2015).

of this gesture and the politics of the wider production were lost on some critics – for example, *The Guardian*'s Michael Billington, who complained of a lack of “consistent approach” throughout the production, and for whom “the parading of a giant penis of a kind we haven’t seen since Peter Brook’s 1968 production of Seneca’s *Oedipus*” was not a moment of critique, but one of a series of “oddities”.¹⁷

Though the aesthetic variability of the piece thus registered as incoherent to some critics, this strategy was intrinsic to its argument and its dialectical effects. In performance at the Globe, *The Oresteia* deliberately located the bodies of its audience members and actors in multiple temporal schemas – the classical Greek polis represented in the drama, the theatre’s imitation early modern architecture, and the political, cinematic and broadcast cultures of postwar Britain and Europe – in a commentary that unmistakably engaged with contemporary political and economic crisis. As a spectator, the most striking impression on entering Shakespeare’s Globe was first the alteration made to the playing space. Shakespeare’s Globe is a smaller but faithful reconstruction of the ‘wooden O’, the early modern Globe Theatre first built in 1599. Sheltered by a shallow roof, its finely decorated stage thrusts into the yard. The yard itself is open to the elements, and can accommodate around 700 people, with a further 800 in the surrounding covered galleries. The standing tickets in the yard, on sale for £5, are easily the best in the house in terms of sightlines and proximity to the performance, and at this point are arguably the cheapest available in London. For this production, a cladding of rough wooden planks (Thomas: “really nasty chipboard”)¹⁸ hid the Globe’s ornate stage backdrop, the vengeful aphorism ΤΥΜΜΑ ΤΥΜΜΑΤΙ ΤΕΙΣΑΙ (“you will pay stroke for stroke”)¹⁹ sprayed upon them in red. This scenography both concealed the Globe’s gilt columns and balustrades, and brought them into dialogue with the Eurozone crisis and its consequences for Greece – communicating an interruption to the building as spectacle, and, through the semantic content of the words upon the cladding, the relevance of revenge to the contemporary political situation. The boarded-up stage communicated, as Giulia Palladini writes evocatively of the post-2008 moment, “a time dispossessed of a future and yet projected towards – and marked by – a hori-

¹⁷ Billington (2015). For a brilliant response to Billington’s review, see Haydon (2015).

¹⁸ Tonkin (2015).

¹⁹ Shapiro, Burian (2003), pp. 3-38 (p. 35).

zon of potential, forthcoming failure and collapse”.²⁰ And yet the imitation early modern structure, still partially visible behind it, acted as a reminder of the provisionality of dispossession and failure. A set of steps built specifically for the production provided a means for actors to ascend to the stage from the yard. The play’s action began with a Watchman, clad in twenty-first century riot gear, witnessing a beacon signalling victory at Troy. He departed as the members of the Chorus made their way slowly through the audience, up the steps, to the stage – all six in suits and overcoats that advertised their social standing and historical time as lower middle-class workers of the 1940s. When Agamemnon appeared, driving through the audience with the captured Cassandra, he wore ancient military garb, his face, arms and attire soaked in blood. So *when* were we exactly?

The sense conjured by the production was that we – performers and audience – were at all and none of these moments. Like one of its cinematic influences, Theo Angelopoulos’ *The Travelling Players* (1975), in watching *The Oresteia* we were engaged in a “voyage in time and space”.²¹ Angelopoulos’ film offers an account of Greek politics and society between 1939 and 1952, encompassing popular resistance to fascism, betrayal by the British government and the eventual success of the right-wing Papagos government in a US-sponsored election. This account is told through the story of a theatrical troupe whose own relationships broadly map onto the myth of the House of Atreus. The film, structured around the troupe’s attempts to stage Spyridon Peresiades’ pastoral *Golfo the Shepherdess*, uses theatrical devices and temporal shifts throughout. As Linda Myrsiades proposes, the use of theatrical devices to tell this story on film “puts history itself onstage and reveals the extent to which agency is reduced to ‘audiencing’ and social life is prescribed”.²² Angelopoulos himself comments of his film: “what I was trying to achieve is a kind of Brechtian epic, where no psychological interpretation is necessary”.²³

Thomas refers to her love of the cinematic image, and the influence for this particular project of Derek Jarman’s films, Angelopoulos’ *The Travelling Players* and another late twentieth century *avant garde* film, Alejandro Jodorowsky’s *The Holy Mountain* (1973).²⁴ This influence was seen especial-

20 Pallidini (2015), pp. 17-36 (p. 18).

21 Tarr, Proppe (1976).

22 Myrsiades (2000), pp. 135-149 (p. 135).

23 Demopoulos, Liappas (2001), pp. 16-22 (p. 18).

24 *The Oresteia at the Globe Theatre* (2015).

ly in Hannah Clark's design. The similarity between the Chorus and Angelopoulos' Players in the film's opening moments is very striking: a group of respectable but slightly down-at-heel men and women, sporting dark overcoats, hats, and carrying suitcases. At an early moment in *The Travelling Players*, a Roman centurion makes an appearance, tailing two fascist officers down some public steps, while three of the Players proceed in the opposite direction. This uncanny and unremarked upon sighting of an ancient military figure by people in the film narrative's present proposes the continuity in modernity of older imperial struggles, and suggests a point of inspiration for the presentation of Agamemnon at the Globe. In the production's final act, Athena's courtroom took a psychedelic monochrome design, replete with black oval braziers and, for the jury, 1960s stools bearing iconic eye symbols. The goddess herself wore a long-sleeved and high-necked floor-length gown covered entirely in golden sequins – injecting a sense of divine glamour into the hitherto drab and crumbling situation. This final act of the production thus bore a clear visual affinity with the aesthetic of Jodorowsky's film – a text that grapples with religious iconography, structures and systems of authority and belief, and the ideological function of cinematic representation. But beyond visual referents, the logic of *The Oresteia* resonated strongly with Angelopoulos' aim of thinking history dialectically through aesthetic form²⁵. If, for Angelopoulos, the theatre was the ground of this thinking in the cinematic context, *The Oresteia* pursued its dialectical thinking through the juxtaposition of stage images – some of which, as I have described, were re-mediations of cinematic images – with the world of texture and sound it created in the Globe auditorium.

For *The Oresteia*, the vibrations of music, sound and silence in the space of the Globe proved critical. As Paige DuBois has argued, the genealogy of criticism addressing ancient tragedy has focused unduly on the plays as “portraits of individuals”.²⁶ However, taking advantage of the Globe's collectivizing architecture, this production undid any impetus to or focus on the heroic protagonist Orestes, and turned its attention instead to the group, the social body. The body is worth emphasizing, as it was precisely in an embodied mode that the production's intervention was most affecting. The approach the production took, punctuating the action throughout with music and sound, and during the scenes located in sacred sites, with incense smoke and haze, served

25 Tarr, Proppe (1976).

26 DuBois (2004), pp. 63-81 (p. 65).

to deepen its engagements with embodied historical experience. While the production's narrative spoke of structural transformations, in performance it also asserted the sensate and co-present dimension of theatrical assembly, to sometimes contradictory effect.

For *The Oresteia*, composer and sound designer Mira Calix wrote acoustic instrumentation and choral compositions performed by its musicians, actors and choir. And against these compositions, she layered electronic sounds that strongly invoked the BBC Radiophonic Workshop – a small but hugely influential unit which produced futuristic electronic sound effects and music for the corporation's experimental arts, education and children's radio and television programming between 1958 and 1998. As many attest, the distinctive aural aesthetic of the Radiophonic Workshop is highly recognizable, especially to those who grew up hearing its compositions, and is redolent of a particular moment in public broadcasting.²⁷ For one broadsheet critic of Calix's earlier recordings, the “pebbles, insects and a studio cluttered with temperamental machines” used by Calix on her second album *Skimsitta* (2003) suggest that she “would have felt right at home alongside Delia Derbyshire in the BBC Radiophonic Workshop of the early 60s”.²⁸ Derbyshire, famously, was instrumental in producing one of the Radiophonic Workshop's most distinctive outputs, the theme tune to sci-fi television series *Doctor Who* (1963-date). Mark Fisher argued that the citation in 2000s electronica of the Radiophonic Workshop's radical aesthetic represented a kind of oppositional nostalgia for twentieth century social democracy, and the “expectations raised by a public service broadcasting system and a popular culture that could be challenging and experimental”.²⁹ But, for Fisher, its use in such music in the mid-2000s also appeared as a symptom of ideational and political exhaustion: in the face of the ‘end of history’ and global capitalism's apparent victory, the ‘futuristic’ offered not radical potential but an ossified “established style”.³⁰

As I interpret it, in *The Oresteia*, the combination of electronic sounds with non-electronic music and theatrical images did not represent a similar failure

²⁷ As *Guardian* critic Ed Miller puts it (2004, p. 23): “Its sound, imperceptibly, was thrust into the background of millions of British lives in shows such as John Craven's *Newsround*, *Tomorrow's World* and *Blake's 7*. For many of us thirty-to-fiftysomethings, the BBC Radiophonic Workshop was the sound of our childhood”.

²⁸ *Empire* (2003), p. 16.

²⁹ Fisher (2012), pp. 16-24 (p. 18).

³⁰ Fisher (2014), p. 9.

of imagination regarding the future, but something rather more ambiguous.³¹ While in other contexts the use of these sounds might have seemed like a nostalgic “*formal* attachment to the techniques and formulas of the past”,³² here they deepened the production’s attention to the historical and the mythic, and paradoxically enabled it implicitly to offer a reflection upon the future. Critical to this effect was the interaction of the sound design with the acoustic space of the Globe. One of the founding principles of the reconstructed Globe was to offer conditions for performance as close to those offered by the early modern theatre as it was possible to provide. Prior to the controversial first season of the Globe’ third artistic director Emma Rice in 2016, it made limited use of artificial light and sound.³³ Instead, as stage manager and researcher Linnéa Rowlatt puts it, it has been “a venue that eschews electricity”³⁴ to prioritise natural light and sound. For *The Oresteia*, Calix negotiated unusual permission to use amplified sound in the theatre. She deployed a set of portable Bluetooth speakers, which were concealed in the costumes of the members of the chorus. Calix remarks that she treated the Bluetooth speaker “as an instrument”:³⁵

I really wanted that sound to come from the Greek chorus, and it’s only the Greek chorus that have these units hidden in their costumes. So it actually feeds into that tradition of the Greek chorus being the musical element of the play.³⁶

Paige DuBois refers to the performance, in ancient drama, of “choral song that is necessarily collective, diverse and heterogeneous”, and through its performance, “its insistence on another place from which the tragedy addresses its audience”³⁷ – that is, beyond the voice of the heroic protagonist. I read DuBois’ use of the word ‘place’ here as metaphoric, connoting an alternative dimension of communication. With its use of the portable speakers, this pro-

31 Fisher (2014), pp. 4-5, refers an account of the incidental music of British television show *Sapphire and Steel* (1979-1982), whose construction takes a similar form: “a small ensemble of musicians (predominantly woodwind) with liberal use of electronic treatments”.

32 Fisher (2014), p. 11.

33 For some insight into the controversy, see Lukowski (2016).

34 Rowlatt (2013).

35 Bowers and Wilkins (2015).

36 Bowers and Wilkins (2015).

37 DuBois (2004), pp. 71, 64.

duction recalled that dynamic – both in terms of the substance of the ‘speech act’, as it were, and also the speakers’ literal emplacement in the auditorium. During the run, actor Dean Nolan reflected that in performance “there are moments when we walk in as a Chorus – we walk through the audience and suddenly they’re like: ‘where’s this sound coming from?!’”³⁸ The commingling of the Chorus with the audience and the sound emanating unpredictably from their bodies thus offered a twenty-first century aesthetic manifestation of the ancient choral emphasis on the collective. And, in the final act, members of the Borough Market Choir played Athena’s jury. They were dressed in similarly workaday costumes as the Chorus in the first two acts of the play. As they filed onto the stage, they intoned a choral song. But for the majority of the scene, they were completely silent. They ultimately delivered their votes on paper slips to a receptacle in the middle of the stage. Given the richness of the texture of sound throughout the production, the silence of these characters during the enactment of the trial was conspicuous, with the effect of drawing attention to the limits and context of the individual juror’s ‘voice’.

As an audience member in the yard, the effect of the sound design was unusually pervasive and creepy. The performance was not restricted to the stage platform, but amongst us in a way that felt surprising; the textures of the stage world were physically proximate to us, reinforced by the production’s consistent use of heavy incense smoke and haze. Bruce R. Smith shows that the materiality of Shakespeare’s Globe lends itself to this particular distribution of sound and its engagement of its audience in the yard as unregimented assembly:

In a cylindrical structure like the Globe, open at the top with nothing for soundwaves to strike against and closed at the bottom with highly absorbent material in the form of human bodies, sound waves would have been reflected mainly from side to side, not top to bottom. The result would have been a ‘broad’ as opposed to a ‘round’ sound. [...] Performers in the reconstructed Globe in London have commented on the way audience response can start in one part of the theatre and spread laterally to the rest. The experience of broad sound comes not only from the actors onstage but from one’s fellow auditors.³⁹

In other words, the spatial context of the Globe provides an environment in which sound can spread contagiously. *The Oresteia*’s “voyage in time and space”⁴⁰ and its reflection on collective sociality was thus effectuated through

38 Bowers and Wilkins (2015).

39 Smith (1999), pp. 213-214.

40 Tarr, Proppe (1976).

a theatrical combination of image, texture and sound – with sound in particular offering a haunting meta-representational echo of cultural production of the recent past. For this reason, as I watched, I began to understand the production in terms of science fiction – a speculative genre of course deeply concerned with such voyages. This effect became intensified in the final act, with the appearance of the zombie-like Furies and Athena’s court as a glittering dream-like domain. It was not the future that was being addressed in this mode, but the past – familiar signifiers being used for an unfamiliar purpose, to solidify in our minds a deep sense of our estrangement from the ancient – alien – world of the play, while at the same time, a sense of shared experience of assembly as a social body in the present.

At the beginning of the final act, the Pythia, Apollo’s high priestess, gives a direct address to the audience on the theme of devotion to the gods. It is made not in terror of the consequences of Orestes’ murderous actions, as in Aeschylus’ text, but about the fragility of political balance in the present, to an imagined secular theatre audience now unconcerned with the “old gods” and “the temples”.⁴¹ It might be thought as sabotage to the production’s dialectical mode, and a moment of didacticism. Following a very well received gag about unused churches as prime real estate (“They’re huge, almost empty, and in really good locations”),⁴² the priestess says:

It only takes
A hot thought to steal into someone’s head
To start a revolution
It only takes a vote to go one way
For those in charge to dismantle all your rights.
So what then? When the universe’s curtain
Twitches and rips, and blood boils up again,
What then? [...]
So don’t dismiss the temples, keep them safe.
For there shall come a time when you shall know
The old gods are not dead, they’re just... asleep.⁴³

However, the performance did not finish with this moment, but instead its carnivalesque celebration of democracy, making of the Pythia’s speech not a

41 *The Oresteia*, Adapted by Rory Mullarkey (2015), pp. 89-90.

42 *The Oresteia*, Adapted by Rory Mullarkey (2015), p. 89.

43 *The Oresteia*, Adapted by Rory Mullarkey (2015), pp. 89-90.

summary exhortation but a position taken in dialogue with others.

As darkness began to fall, and the performance ended, I understood the show's argument to have been this: in the context of economic crisis, where notions of "political fatality"⁴⁴ authenticate brutal cuts, social democratic structures should be defended. However, then and there – wherever then and there were – they were not yet good enough, the aim of providing a system "for those in charge / And for those most vulnerable in our society"⁴⁵ being laudable, but predicated on fundamental inequality. The production brought forward the gendered antagonism that is at the heart of Aeschylus' drama of justice and democracy. Viewed in the context of this production, Thomas' utopian desire to use the Globe as a space for "political expression"⁴⁶ for me connoted not a naïve commitment to theatre as a space of democratic engagement.⁴⁷ Instead, it seemed to engage with what Nicholas Ridout commends in his discussion of this theme: a "politics of theatre, in which the form's entanglement with the constitution of political relations is exposed".⁴⁸ The key aspect for me in this regard was its use of the materials of theatre – narrative, image, sound, and the gathering of bodies in space to watch and be watched – to play with historical time. It shuttled backwards and forwards in time with the use of cinematic and broadcast cultural references, asserting a dialogue between theatre and other modes of representation. In doing so, it challenged the ubiquitous and politicized narrative of crisis that "affects both the individual and the collective body by imposing a continuity of time perception: defining the present as a perpetual falling towards its end".⁴⁹ It also refused an analogous dynamic, which Margherita Laera refers to as the "mechanism of the classical",⁵⁰ which imagines canonical texts as universally relevant and applicable to contemporary concerns, thereby obliterating cultural and historical difference. At the same time, it drew clear and explicit attention to the transhistorical purchase of patriarchal social relations. *The*

44 Pallidini (2015), p. 19.

45 *The Oresteia*, Adapted by Rory Mullarkey (2015), p. 105. Athena's subsequent plea to the Furies to "help us war down all our foreign foes / In just conflicts, to bring peace to the world / To civilise the planet, bring our better systems / To those who need them" (p. 107) articulates the imperial feminism critiqued by Hester Eisenstein (2009).

46 Tonkin (2015).

47 Ridout (2008), pp. 11-22 (p. 15).

48 Ridout (2008), p. 19.

49 Pallidini (2015), p. 19.

50 Laera (2015).

Oresteia's iconoclastic yet deeply serious approach to Aeschylus approached time as recursive, and audience members, gathered together for a moment in time to witness the performance, not as a singular unit locked irretrievably in a given set of circumstances but a differentiated group. For this nuanced, aesthetically complex and entertaining version of *The Oresteia* to have been staged at the Globe, mounting a critical feminist defence of collective sociality, marked a moment.

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REPRESENTATION OF THE CRISIS VS REPRESENTATIVE DEMOCRACY IN ITALY

Roberta Calvano

1. The European constitutional systems' reactions to the crisis

In the last few years a big debate has developed in the social sciences over the impact of the international financial crisis on the European Union and its Members States. This was just one aspect of a wider discussion over the dominance of neoliberal theory in the western political and economic arena, and especially in the European integration process. The legal profile of this debate concerns mainly the impact of the crisis on EU Member States' Constitutional systems, together with the peculiar aspects of anti-crisis measures adopted by the EU institutions. The aim of this paper is to offer a small contribution to this debate from the Italian Constitutional point of view, by looking at it from the perspective of a Representativity versus Representation dichotomy.

One of the main questions I would like to address concerns the effects of the crisis on the functioning of the Italian government framework. Constitutional law scholars have for decades been studying the difficulties and fragmentation of the Italian constitutional and political system, widely considered way too inefficient and unstable in comparison to other western democracies. This structural weakness of the Italian political system, as could be easily predicted, has made Italy a sitting target for international financial speculation. Since 2011 this element has been influencing its democratic process, which is being limited by the constant threat of financial speculation. This is one of the reasons why, when the 2008-2009 economic crisis exploded, it could not but deepen the gap existing among Italy and other larger and richer EU member States, generating strong international pressure on the Italian Government regarding the level of public debt. At the end of 2011, this pressure led to the resignation of the Italian Prime Minister and its Government and the birth of a new Government guided by Mario Monti.

Since then, political developments not only in Italy, but also in Greece, Portugal and Spain, and lately in other Member States, seem to show that the international financial crisis is at the root of a transformation concerning not

only the functioning of the constitutional frameworks in European democracies, but the effectiveness of fundamental principles of the EU Treaty.

Though several interesting EU law questions could be raised concerning the EU reaction to the crisis, the EU institutional actors involved, and the derogation to some important rules of the Treaty, the main focus of this analysis is on compliance with some fundamental rules of the Italian Constitution of 1948. As I will briefly recall in my conclusions, however, other members of the Union are also being affected by this process, as shown by the European Parliament elections in the first place, and then by those in Austria, France, Germany and by the British referendum on EU membership (Brexit).

2. Italian and European integration, constitutional developments and the representation versus representativity problem

Most scholars and observers converge on the idea that government stability has been a serious problem since the birth of the Italian Republic. Nevertheless, throughout the first fifty years of the Republic the Parliamentary majority and the Government have been firmly held by one party – Christian democrats and its allies – and the following period has seen the predominance of a party led by the notorious tycoon, Silvio Berlusconi. Thus the frequent changes of Government seem to depend mainly on the nature and character of Italian parties, their internal conflicts and the dialectic among different factions. This issue however hardly appears in the discussion on governmental stability, which often shifts to finding the perfect solution, a sort of *panacea*, in a comprehensive Constitutional reform.

Constitutional Reform has then become some kind of utopia, being discussed and pursued over the last three decades, while the highly fragmented political system and the loss of political parties' legitimacy after the huge "Tangentopoli" bribery scandal, affecting the political system as a whole, led to some remarkable legislative reforms. Above all, the 1993 bill, transforming the electoral system into a majority model abolishing voting preferences, started a major development with a spillover effect on the Constitutional system of government as a whole.

The '90s saw a gradual transformation of the Italian form of government with consequences involving not only the political structure of the system, but also economic and regional development. This process, together with the ac-

celerating transfer of competences to the EU after the Maastricht Treaty, increasingly involving national Governments rather than Parliaments, further impoverished the role of the Italian Parliament, which was intended to be major in the Constitutional architecture. Since the nineties, it has to be added, the abuse of governmental legislative powers regulated by art. 76 and 77 Const. helped contribute to the marginalization of parliamentary legislation.

Looking at the issue in a wider perspective, it has to be recalled that several studies concerning the European integration process from a legal point of view show quite well how the Maastricht Treaty and the following Treaties have been pushing towards an ever stronger role for national governments in the European Union. This trend has been moving the center of gravity of Member States' constitutional systems in the direction of stronger Executives and, again, towards the risk of a consequent weakening of Parliaments. Italy is one of the clearest examples of this process, the Government being the only actor deeply involved in legislative procedures in the EU, due to a certain underestimation of regional and national parliamentary powers in the EU decision making procedures.

While this process emerged, the EU institutional framework was evolving towards a greater role for the European Parliament, together with an increasing transfer of powers to the European Union due to the changes in EU Treaties. As has already been said, the transfer inevitably led to a loss in the role of representative bodies – at both local and national level – inside members States' constitutional systems. EU architecture has for decades privileged intergovernmental cooperation (not only in the second and the third pillar), and a similar trend has been recently confirmed by EU anti-crisis measures¹. All these elements have resulted in an inevitable transformation in the balance among constitutional institutions – in other words the marginalization of national Parliaments.

Lack of transparency is another consequence of this process. The Council of the EU discussions, as a rule, are not public. The Council meets in a public session only when it discusses or votes on a proposal for a legislative act², whereas the influence of comitology and lobbies representing big corpora-

1 Such as the EFSF (European Financial Stability Facility), agreed by the Council of the European Union on 9 May 2010, with the objective of preserving financial stability in Europe, or the ESM (European Stability Mechanism) intergovernmental treaty established on 2 February 2012.

2 In these cases, the meeting agenda includes a 'legislative deliberation' part.

tions and financial interests has been censured ever since the birth of the integration process. Due to this character of the EU decision making process, national Governments often engage in a blind shift game, blaming “Brussels” for all the unpopular EU choices they helped approve. We are all familiar with public statements by prime ministers, which can be summed up as “Europe asks for it”. How this practice in public discourse affects the responsiveness of European Governments towards Parliaments can be easily imagined.

European integration affects many aspects of constitutional systems in several different ways. Legal sources, judicial protection of constitutional rights, public services are all strongly influenced by EU law. They all now seem to be hit by negative effects of the crisis, spreading from the economic to the institutional sphere and showing the inherent weakness of the EU architecture, which had been hidden by prosperity and economic growth during the golden era of the integration process.

In such a scenario, marked by the fast spread of populist parties in Europe and reaching its highest point in the European Elections of 2014³, the main difficulty for national Governments seems to be the matter of communication with an impoverished and angry electorate. Imitating the sirens of populism has become a big temptation for traditional parties, and part of this game passes through public declarations, social media and a “representation” of political decisions not always corresponding to their actual content. Some clear examples of these tendencies can be found in the Italian experience, where provisions adopted with legislative measures are often preannounced even before they are written (urgent decrees are often implemented by approving only the cover, which is disclosed to the press, while the act itself is then published in the official journal only several weeks later). The constitutional reform bill approved in 2016 can be considered another remarkable example of this practice. Its title (referring to measures aimed at a “reducing the costs of politics and the number of members of Parliament”) seems clearly designed to put a “good gloss” on the set of measures (gathered in 47 articles) that citizens then rejected in the constitutional referendum of December 2016.

3 Since that election, the French Front National and the British UKIP are the most represented French and British parties in the European Parliament, and the M5S movement is the second largest Italian party. This tendency has since then continued, and Front National seems ready to contest the next Presidency of the Fifth Republic, while the Italian M5S is set to challenge the primacy of the Democratic Party in the 2018 political elections.

3. The Italian answer to the crisis: “reforms” by urgent decrees

Urgent decrees offer a very good example of the impact that the financial crisis produced on the representativity versus representation issue under discussion.

As a result of the difficulties arising from the crisis and the serious threat of an attack on the Italian public debt on financial markets, as previously mentioned, Prime Minister Berlusconi, (who at that time was leader of the majority party and member of the Parliament) was forced to resign during the XVI Legislature and a new Government was appointed. The appointment of an economist and former European Commissioner as President of the Council, quite clearly on the basis of his technical competence and Brussels’ appreciation of his name as he was not member of any political party, was quite an innovation in the context of the traditional “Westminster system” and sidelined some of its basic rules.⁴

When the new Government took office in November 2011, it presented to the Houses of the Italian Parliament a political program entirely focused on a series of measures related to the economic situation. The main instrument in this phase, since then largely prevailing over regular legislation, despite two rotations of the Government helm, was urgent decree, regulated by art. 77 Const. While the use and abuse of the instrument had steadily grown in previous legislatures, from 2011 onwards the scale of the problem of abuse of urgent decrees increased even further and their content shows distinctive features that we shall try to analyze in the following pages.

One aspect of these legislative acts deserves to be pointed out in the first place. The contents of these measures correspond, to a large extent, to those listed in the letter sent in August of 2011 by the outgoing and incoming Governors of the ECB to the Italian Premier Berlusconi⁵. Momentarily leaving aside the constitutional (and fractious) issue of the real political source of normative acts in this phase, we have to linger on the vehicle used to marshal them in the Italian legal system, the already mentioned urgent decrees.

The preambles of these acts must state the reasons of necessity and urgency functioning as their constitutional legal basis. (art. 77 Const. allows these

⁴ Sen. Monti had been appointed “senatore a vita” only a few days before his new task as the chief of the Executive.

⁵ The letter can be read on the website of *Corriere della Sera*: Draghi and Trichet (2011); on the subject see Olivito (2014).

acts only if on “casi straordinari di necessità e urgenza” – under extraordinary and urgent circumstances). It ought to be underlined on this subject that, during the last few years, these circumstances are assumed to be constantly standing because of the crisis, as if the crisis itself could permanently legitimize Government legislation. A legislation going outside of its constitutional limits, and overflowing the normal scope of Government competence, both in quantity and quality one could say.

These acts are important both for their scale (the number of the provisions they contain)⁶, and because they relate to matters which would require stable regulation over time, so as to be necessarily approved after an appropriate parliamentary debate among all political parties. These measures often have highly dishomogeneous content. (e.g IMU – Banca d’Italia decree No. 133/2013, introducing rules about the proprietorship of the treasure of the Italian Central Bank together with home taxation abolishment, but well renowned also for the hasty approval of the Parliamentary bill confirming it, through the so called “guillotine” clause, arousing sharp indignation among the Parliamentary minority).

Beyond the question of the content of such urgent decrees, which raised substantial and procedural issues at the same time, certain rules need legislative procedure guarantees, (art. 72 c. 6 and 77 Const.), whereas the way the Parliament interpreted its task to convert them into statutes provoked other constitutional complaints.

The regularity with which a precise sequence occurs at this stage does not seem to show significant exceptions. The resolution of the decree is followed by the presentation of a maxi-amendment to the bill proposal by the Government, presenting at the same time a “questione di fiducia”. Such “questioni di fiducia” are instruments governed by Italian parliamentary regulations, involving the Government’s commitment to resign in the case of rejection of a bill, with a blackmail effect of the majority by its Government.

This way, the role of the parliamentary debate is diminished, to the point that any possibility of impact on the measures taken by the representative institution *par excellence* is cleared out.

An important aspect of this legislation deserves to be underlined as it con-

6 Interesting analysis developed in relation with the number of columns in the official journal, compared to the past. See this data by Cimino, Morettini, Piccirilli, (2013), pp. 59ff. Since 2006-2010, when 95% of spending through parliamentary decisions was deliberated by urgent decree, the data trend has worsened. Lippolis (2011), p. 22.

tributes to compromising its quality and efficacy. The role of parliamentary commissions involved in converting urgent decrees into parliamentary statutes has been diminished by the fact that, as anti-crisis measures, they were assigned mainly to the budget commission, with other competent Commissions being only consulted. Due to the heterogeneous content of the decrees, up to ten Commissions would have been involved. The inevitable consequence is merely superficial examination of the measures of the disciplines being approved but meant to produce an impact on the economic situation. Because of the poor quality of the technical elaboration of these acts, this effect could not always be assured.

Another interesting feature of this governmental activity should be underlined. At the beginning of the XVII legislature the Government took account of the huge backlog consisting of the implementing measures of urgent decrees overdue (those regarding decrees approved by Mr. Monti Government amounted to 832). A majority of the provisions adopted urgently because of the crisis and which thereafter pressured the constitutional limits of legislative process, were not self-executing and needed regulation to allow them to be implemented.

On December 2013, the percentage of Governmental acts already implemented was 38% (more than 50% of them by the Mr. Monti Government, 12% by the following Government chaired by Letta). In that same month, the Budget act referred to 117 implementing measures.⁷

The desire to portray what was unfolding as an incisive action against the crisis, and perhaps the desire to reassure markets, appeared to be at the basis of the work of the Government, but also of the Parliament. All this, however, seems to have triggered phenomena detrimental to political representativeness. A decision-making process increasingly secluded from public debate and influenced by international financial markets, in which, however, an inability to meet the economic challenges of the emergency prevailed.

4. Representative democracy vs representation in political party financing

A particularly interesting area in which a similar trend can be detected is the regulation of party funding adopted by Decree Law No. 149 of 2013, whose conversion into law was signed by Prime Minister Letta on February

⁷ See Pitruzzella (2013); Calvano (2014).

21, 2014, on the last day of his tenure. Not only its contents, but also the formal procedures followed are interesting, in light of what has been briefly reported regarding the practices of parliamentary proceedings during the XVI Legislature. This case provides in fact a further opportunity for reflection on the distortion suffered by the constitutional system in relation to the crisis. Its emergence seems to have produced the need to give visible – rather than effective – answers to problems.

The regulation in question had been initially presented as an ordinary bill, and had already been passed in the House. Then, during the examination by the Constitutional Affairs Committee of the Senate, the Government suddenly withdrew the bill approving an urgent decree with the same content. The unexpected removal of the measure from the Senate and the will to circumvent the parliamentary debate was evident in this case and seems highly significant, especially considering the content of the regulation then approved.

The decree is headed “Abolishment of parties’ direct public funding”. It introduces a regulation which will fully apply from 2017, based on the matching of two forms of indirect public funding, for parties seeking to be included in a public registry by respecting certain formal requirements in parties’ internal regulatory arrangements.

It is therefore required that party organizations respect a minimum regulation aimed at promoting the democratic processes as set out in art. 49 Const., as a condition for access to the indirect financing tools, which will therefore continue to burden the State budget

The bill allowed public financing for four financial years, providing for a gradual reduction thereafter. From 2017 the new regulation allows parties to be eligible under the terms provided by law, to get 2‰ of income tax from those citizens who choose to act in their favor.

In addition, donations by individuals, permitted up to a maximum of one hundred thousand euros per year, will be encouraged by the deduction of 26% from income tax, provided the donations are kept within a maximum of thirty thousand euro per year.

The preamble of the decree states the constitutional urgency basis thereof, motivated by the need to respond to the demands of austerity at a time of crisis with reference to political customs.⁸ The regulation seems to be quite unsuitable both to implement the democratic method the Constitution requests for parties and to revitalize the role of political mediation between society and

8 See Dickmann (2014).

the representative institutions which seems rather tarnished, especially in the Italian constitutional and political experience of the last three decades.

As seems quite clear, the Italian crisis is not only an economic phenomenon but also a regime crisis. A crisis of representative bodies and a crisis of the political party system.

One may wonder then if the answer to this state of affairs can be found by stiffening financial budget standards through austerity measures and compressing participation and social rights, as the new provisions suggest, instead of stimulating a renewal of the democratic circuit.

5. “Public consultation” and decision-making in the school reform bill

The relationship between what has been defined as the “sovereign debt crisis”, and the increasing welfare state cuts already taking place in Europe, had one of its main turning points in the Greek crisis. The first raft of measures imposed by the European Commission, the ECB and the IMF in 2012 had triggered the objections of workers and pensioners unions. The European Committee of social rights of the Council of Europe thus condemned those measures as illegitimate in relation to their purpose, having unnecessarily squeezed rights to wages, retirement and study. In this regard, it must be held that the imposition of conditions for access to international financial aid for States in difficulty cannot justify any kind of measure that is restrictive of social rights. The EU Treaty dispositions on social rights, in fact, request its institutions to comply with democratic procedures when they set procedural obligations to take such measures, and to show the proportionality of measures and the absence of better alternatives for the protection of social rights.⁹

Although the contrast between social rights and welfare reforms introduced in Italy has not yet reached the dramatic levels seen in Greece or in Portugal, the Italian experience of the last few years shows a series of governmental actions developing in the same direction, in accordance with the constitutional revision of article 81. Even in this context, the Government seems to have replaced the representative democratic process with its own representation, using mechanisms and marketing techniques that have been referred to in previous pages and that this article tries to describe.

⁹ Decisions by the European Committee can be read at <http://hudoc.esc.coe.int>. On the European Social Charter see Russo (2013).

Thirty billion Euros of national health budget cuts in five years is the first chapter in this story,¹⁰ but the linear cuts in these years also concerned education, assistance to the disabled, social security and the University system.

In this framework, the salary freeze in the public sector is a measure enabling the State to recover a large amount of resources, requiring a major financial sacrifice to civil servants. This sacrifice was not “represented” in the sphere of public discourse, whereas the media often devalues civil servants.

In such a social and political scenario, the mantra “Europe asks for it” is consistently cited, even before the Constitutional Court when it was called on to review the constitutional compatibility of the salary freeze of academics. The contested provision was defined before the Court as one of the “cooling mechanisms of public sector wage growth demanded of the Italian State directly by the EU”¹¹, thus recalling not a directive or the EU Treaty, but the letter by Mr. Trichet and Mr. Draghi, referred to above, concerning the need to reduce the ratio of GDP and public deficit in Italy.

On the subject of education, the public representation of a listening procedure involving the world of education (teachers, school administrators, families, students) through the dialogue process activated online by the Ministry of Education on its website is worth mentioning¹². This can be considered quite a good example of how the representative process is being twisted to the needs of political communication. The democratic debate in Parliament has been eluded, as the discussion and deliberation of the bill concerning the school system (the so called “buona scuola” approved with law No. 107 del 2015), was cut off by the Government, calling on its majority to approve a “questione di fiducia” (involving the Government commitment to resign in case of rejection) on a single article consisting of 212 subparagraphs that had no heading and was thus illegible.

The reflection on media representation vs representative democracy finds a very good case study in this bill. In fact, its immediate consequences already show what awful results such legislation techniques can produce. The bill delegates to future legislation the solution of some of the urgent problems, such as teachers’ recruitment, while its hastily approved regulation is already failing its objectives as many applicative difficulties are arising and disputes are being brought to courtrooms.

10 These are the data collected by CGIL (Italian largest syndicate).

11 This sentence is part of the plaidoyant by the State defense in the case for judicial review by the Constitutional Court ruled with decision No. 310/2013.

12 The website <https://labuonascuola.gov.it/> can still be visited online.

Despite endless application issues raised by the teachers' recruitment procedures, (due to the abuse of successive fixed-term employment contracts in violation of EU law and the connected infringement procedure and ECJ ruling in the Mascolo case¹³), the bill is now being spoken of as a commendable stabilization of tens of thousands of temporary teachers. Less publicity was given to the fact that teachers' recruitment procedures in Italy were compulsory due to the judgment rendered by the Court of Justice on November 2014.

The dichotomy of representativity vs representation regarding welfare reforms in Italy is quite remarkably evident in the labor market reform too. A harsh debate has raged between the Government, INPS (National Social Security Institute) and ISTAT (National Institute of Statistics) since summer 2015, concerning unemployment data after entry into force of the so-called *job's act* (a 2015 bill reforming the labor market), the flagship measure and the reforms demanded by the European institutions of the Italian Government since 2011 aimed at making workers' guarantees more flexible in order to stimulate new employment.

Unlike the data published by the Ministry of Labor and INPS, those disclosed by the National Institute of Statistics in fact showed a decline in employment, and a progressive deterioration of the quality of wage labor in our country in terms of salary levels and guarantees of stability.¹⁴ Figures are not improving, and no amazing effect seems to be developing as a consequence of a measure whose efficacy, according to labor law scholars, will show through and be apt for evaluation only on a long term basis.

In this area too, however, it does not seem incorrect to say that we are witnessing a phenomenon of predominance of the representation of the responses to the crisis, while political representative bodies seem to have been ousted from the scenario of the most crucial decisions of this phase.

6. Constitutional case law and the public debt crisis: the Constitutional Court's control over the financial implications of its rulings

The crisis of political representation and the inertia of national legislators in the face of the need for protection of social rights initially shifted the em-

¹³ ECJ, ruling in C-22/13, November 26, 2014.

¹⁴ Worrying figures by Istat can be found on Istituto Nazionale di Statistica, Istat, <http://www.istat.it/it>.

phasis onto the role of the courts, and especially the constitutional courts. To many, they seem to be in the best position to be entrusted with a rebirth of rights in Europe. Those who do not share this optimistic “Court-centered” view highlight the necessity to emphasize that only a revitalization of the political representation circuits might be able to bring pluralistic democracies back to their task of safeguarding fundamental social rights. Even at a time of economic crisis. The preservation of the heritage of European constitutionalism, in which theoretical reflection leads us to prefer political representation to the representation, is not the only issue involved. Though, in the last decade the tendency of many scholars to endow Courts with a messianic role has spread widely. However, from a more pragmatic point of view, it has to be said that an attitude more attentive to the effectiveness of the instruments of protection, paired with a knowledge of Italian Constitutional Court case law, as well as that of supranational courts, does not allow us to indulge in enthusiasm about it, but demands continued advocacy for judicial creativity.

The Constitutional Court has in recent years developed case law quite critical of the abuse of legal sources by the government which was censored above. It finally handed down a true “condemnation” in judgment no. 32 of 2014. In that case, the court was called to rule on the legality of provisions introduced in a conversion law, without any correlation to those posed in the urgent decree, “aimed at implementing a radical and comprehensive reform of the Statute on Narcotic Drugs”. The Court blamed the dishomogeneous maxi-amendment practice and its impact on legislative procedures and the role of Parliament. According to the Constitutional Court, “due to the ‘locked’ vote effect that the ‘questione di fiducia’ produces under current parliamentary procedures, any possible intervention on the text presented by the Government was prevented”. It then remarked on the importance of “keeping within the constitutional framework the institutional relations between the Government, Parliament and President of the Republic in legislative performance”. With similar harshness, it ruled on the electoral system in decision No. 1 of 2014 (despite numerous procedural obstacles that could have led it to rule the question as inadmissible) as if to unblock a system jammed by the party crisis. Despite the courage shown by the Constitutional Court in these areas, its case law does not seem to have produced any change in the practice of the constitutional organs on these issues.

Actually, the same mechanisms provided for in the electoral system and declared unconstitutional in 2014 were reproduced, in good part, in the reg-

ulation then approved in 2015. However, in the field of fundamental rights, the attitude of the Constitutional Court in its case law was quite different compared to what we found in the area of constitutional adjudication on the configuration of constitutional organs and procedures. The Court's courage seems to come to an end in the numerous cases regarding the protection of social rights, with rulings in the last few years on compliance with the golden rule set out in the new article 81 Const and the risk of its case law determining an impact on the State budget¹⁵.

The Constitutional Court's self-perception seems to have changed during these years of crisis. It no longer seems to see its role as one of Constitutional guarantee of social rights, as the case law of the Court in 2015 shows. Several were the cases in which declaring a legislative act void would have a significant impact on public finance. Among the other examples, it is worth recalling controversial ruling No. 10 of 2015 concerning the Robin tax, in which the Constitutional Court made an almost unprecedented choice, limiting the retroactive effects of its ruling of unconstitutionality. Such a judicial technique is not explicitly allowed in the regulation of the effects of constitutional judgments. The Court has chosen to produce this result *contra* or *praeter legem* to limit the financial impact of the decision, by creating a balance with the new art. 81 Const. – a constitutional amendment approved by large majority in 2012 – and the Constitutional principles involved in the judgement. A gradual implementation of constitutional values in a case requiring considerable expenses to the State budget, as the Court pointed out, was necessary “a fortiori after the introduction of the principle of a balanced budget in the Constitution, which reaffirmed the need to respect the principles of balancing of the budget and public debt sustainability”. For this reason, it ruled to stop the “effects of the provisions declared unlawful from the day of publication of this Decision in the Official Journal of the Republic.” This is not the place to fully examine the content of the question of constitutionality, but only to note the technique used for the first time. This ruling elevated the role of the constitutional norm of budget balancing to that of a kind of super-principle, laying the groundwork, or at least that is the outcome to be feared, for a negative evolution in terms of protection of social rights. It should however be remarked that the obligation not to apply the rule, declared void following a decision on the constitutionality of the Court, does not ensue from a principle

¹⁵ We have already mentioned one of the many decisions rejecting constitutional issues related to the wage freeze in the public sector.

but from a precise constitutional rule and, as such, is not liable to balancing operations with other constitutional principles.

Even more remarkable was the “sequel” of Ruling No. 70 of 2015 of the Constitutional Court, censuring the freeze on pensions revaluation. The “courage” of the Court in declaring this measure unconstitutional, with a decision that could have a significant financial impact on the state budget, did not give the expected result. The Government approved an urgent decree in order to execute the ruling, and in fact only partly implemented the decision, citing reasons arising from EU legislation and the possible financial impact of the decision.¹⁶ Again, the exceptional nature of the crisis cancelled the basic rules on the normal functioning of the constitutional system, both in relation to the government’s intervention in implementing a judgment, and to graduating the protection of individual fundamental rights.

Finally, with ruling No. 178 of 2015 concerning the suspension of the Unions’ collective bargaining system, the Constitutional Court again established limits to the retroactive effects of its decision. This time it ruled that these effects should begin from January 1 2015, due to the occurrence of the censured facts.

The extension of the suspension of collective bargaining established by the budget act for 2015 is qualified by the Court as a decisive change in the regulatory framework under consideration. This change seems apt to render the reviewed regulation limiting rights acceptable, if temporally limited (reasonable), and intolerable if excessively prolonged over time and (no longer) compatible with the Constitution.

The question as to why this effect did not appear at the time of the entry into force of the Budget act, but only since January 2015 seems worth considering. The Court’s concern about the financial impact of its rulings seems to make it less steadfast in applying procedural rules. This case shows how it is certainly more appropriate to keep the courts away from such concerns, such as those regarding compliance with art. 81, involving an overly severe discretionary and political evaluation, which is likely to undermine the legitimacy of the Constitutional Court. It has to be underlined again how necessary it is for a return to political decision making taken in the proper representative institutions. Decisions would thus be accompanied by a public debate and all other procedural safeguards, making them more reliable. In other words, the “old way” seems to be the only way out for issues that the crisis has raised in representative democracies.

16 On this story Esposito (2015).

7. Some short concluding remarks

Similar reflections may be developed in relation to the process taking place within the European Union regarding the coordination of the economic policy of the member States of the euro area in recent years¹⁷. It is impossible in these last few lines to perform a sufficiently thorough analysis that the complexity of the issue requires, but we can at least remember how the crisis has caught the EU institutions unprepared, notwithstanding the economic policy competences regulated in the EU Treaty. It gives the EU coordinating competence in this area (setting a no bail-out clause in par. 125 TFEU), but it also establishes, in the fiscal compact and in several previous acts, hard budget constraints that have strangled the economies of some Member States.

In this context, as said earlier, national governments are often encouraged towards unaccountable and non-transparent attitudes by the opacity of supranational decision-making processes, allowing them to blame “Brussels” for the unpopular measures resulting from decisions taken by the EU, to which they may have contributed decisively. It is to be believed that at that level some crucial matters should be solved if we want to go back to a correct representation corresponding to a system of representative institutions.¹⁸

This seems the only way to counteract the rising wave of populism, a trend which in just the last three years has made parties such as UKIP and Front National the leading British and French groupings in the European Parliament and has allowed the Brexit referendum to undermine European integration. Such phenomena, as well as the rise of extreme right xenophobic parties, as witnessed in the 2016 Austrian and German elections, can be overcome only by a more transparent and democratic functioning of EU institutions. Such a result can be obtained only by starting here and now a debate on a new Reform of the Treaty, bringing Europe back to its original track.

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¹⁷ Calvano (2013).

¹⁸ See in particular Pinelli (2016); Pinelli (2012), pp. 9ff.

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THE UNBEARABLE LIGHTNESS OF THE FREEDOM OF MOVEMENT: AN ANALYSIS OF THE RELATIONSHIP BETWEEN BREXIT AND IMMIGRATION¹

Lucia Barbone, Erik Longo

1. Introduction

During the campaign for the EU membership Referendum in Britain², a decisive focus was put on EU immigration and its social and economic consequences by both sides³. A particular emphasis was laid on the possibility of regaining control of national borders and solving the issues related to access to welfare benefits. The threat posed by foreigners has strongly influenced the public anti-EU sentiment⁴, more than other factors such as consideration of the potential loss of a national identity⁵. One key message from the poll's result is that migration and the free movement of persons are closely linked to the political and economic destinies of the country.

Therefore, the victory of the 'Leave' side suggests that at least some of the British voters were motivated by anti-immigration feelings⁶, and that the

1 Albeit its unitary conception, Lucia Barbone drafted Sections 4, 5, and 6, while Erik Longo drafted the other Sections.

2 51.9 percent of votes were in favour of leaving the EU. The question of the Referendum was "Should the United Kingdom remain a member of the European Union or leave the European Union?". The referendum turnout was 71.8 percent, with more than 30 million people voting. The details about the results of the Referendum are summarized by Elise Uberoi, *European Union Referendum 2016*, «Briefing Paper», CBP-7639, 2016, <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CBP-7639#fullreport>.

3 The campaign groups are described efficaciously by Vasilopoulou (2016).

4 The Eurosceptic message that made the Brexit Leave campaign so effective is clearly linked to electoral successes of populist parties across Europe in recent years. See Hobolt, Tilley (2015).

5 The relationships between European integration and nationalism is well explained by Polyakova, Fligstein (2016), pp. 60-83.

6 The Ipsos MORI "Issues Facing Britain" analysis has consistently found that respondents cite immigration as the most important problem facing Britain in this moment, and the UK membership is an important part of this issue, <https://www.ipsosmori.com/researchpublications/researcharchive/3715/Economist-Ipsos-MORI-March-2016-Issues-Index.aspx>. See also De Vreese, Boomgaarden (2005).

presence of foreigners, especially Europeans, is generally identified as a real threat for the survival of the British economy⁷. Voters perceived a clear link between EU membership and the immigration levels in the country, and they consider leaving the European Union as an opportunity to curb immigration flows and improve general welfare as a result. Surveys clearly show the relevance of this relationship for the vote⁸, but the real determinants of the immigration fear are yet to be understood. More than a year later, almost a third of the population still considers immigration control as one of the three most worrying issues in the UK⁹.

However, after a year of discussions and negotiations on the Brexit deal, an agreement on immigration control has still not been reached, and there is a lack of clarity of what would happen to EU citizens already in the country.

The debate over Brexit has revealed a major problem in any discussion on the effects of the EU's freedom of movement policies, i.e. the lack of accurate data as a basis for the public debate over immigrants' integration in the UK.

Our article tries to address this incomplete awareness through an analysis of the official statistics on immigration to the UK and the related burden for the welfare state. It then shows the likely implications of the Brexit negotiations for the free movement of people.

The paper proceeds as follows. Sections 1 and 2 discuss the events that have led to the Referendum and the issues that were at the centre of the campaign. Section 3 presents data to quantify the presence of EU citizens in the UK. Sections 4 and 5 consider the likely consequences of the Referendum, and analyse the effects of the negotiations for the EU-nationals currently residing in the country, with a particular focus on the welfare of these persons.

2. From the New Settlement for the UK in the EU to the Negotiations of the Withdrawal Deal

The UK's relationship with the European Union has always been difficult¹⁰,

7 Goodwin (2016), pp. 20-25.

8 Eurobarometer, *Standard Eurobarometer 84. Autumn 2015. Public Opinion in the EU*, 2015, *passim*.

9 Ipsos Mori, *What Worries the World?* July 2017.

10 Gifford (2010).

but it has never been as turbulent as in the past three years¹¹. The decision on 'Brexit' comes after months of complex negotiations among the EU countries on the migration crisis that has been affecting the 'old continent' since 2013¹².

After the 2015 general election the UK Prime Minister, David Cameron, promised to renegotiate the terms of the EU membership, and to announce a Referendum over the new deal¹³. During the European Council meetings in January and February 2016, the PM put on the table the possibility of creating a 'two speed Europe', where those Members States that want to integrate further can do so, while those willing to retain autonomy on specific issues would be allowed to do so¹⁴. All of the Member States would still remain part of the Union, and would benefit from its advantages, such as the single market trade deals. One of the most important parts of this proposal was the reform of the free movement, with the restoration of an immigration regulatory system. In a letter sent to the President of the EU Council, Donald Tusk, on 10 November 2015, the PM brought attention to the unsustainable flow of European workers to the UK, and the abuse of the free movement right. He also declared a willingness to reduce the draw that the British welfare system can exert on other European countries. The more differentiated "Europe à la carte" advocated by the UK Prime Minister did not eventually emerge, but the European Commission declared, after the European Council meeting on 2 February 2016, a willingness to amend both Regulation 492/2011 and Directive 2004/38 on the free movement of European citizens¹⁵.

The EU Referendum of 23 June 2016 has stopped these processes, and has opened a new chapter of the relationship between Britain and the EU. After the vote in favour of Brexit, a stormy period of political and economic uncertainty started. The former Prime Minister interpreted the results as a clear message of defeat for his political aims and stepped down from his office. On July 23rd, the Conservative Party appointed a new Prime Minister, Theresa May, and a new Cabinet. The appointment of politicians strongly in favour of Brexit as ministers, such as Boris Johnson, the former Mayor of

11 Curtice (2016).

12 Council on Foreign Relations (2015). See also the introduction at the issue of the «Journal of Ethnic and Migration Studies» by Hampshire (2016).

13 Dagnis Jensen, Snaith (2016), pp. 1-9.

14 Craig (2016).

15 For a comment of the negotiations see Kroll, Leuffen (2016).

London, seemed to call for a fast conclusion of the negotiations necessary to leave the EU, using Article 50 of the Treaty of the European Union (TEU). On December 7th, the UK Parliament voted with a strong majority¹⁶ in favour of the PM's intention to trigger Article 50 of the Treaty on European Union in March 2017. Two months later, on February 8th, the House of Commons backed the government bill on the Withdrawal deal¹⁷, and on March 29th, Theresa May invoked Article 50 and officially started the process of exiting the EU. Then, on June 21st the UK government published a 'Great Repeal Bill', with the official title 'European Union (Withdrawal) Bill' with the aim to repeal the European Communities Act 1972 and provide a UK 'legislative footing' for all EU legislation¹⁸.

The debate then focused on whether the UK should opt for an 'hard' Brexit,¹⁹ i.e. an exit process without compromises on issues such as the free movement of people and the single market, or a 'soft' one, i.e. a solution that would allow the UK to negotiate the membership of the European Economic Area (EEA) and the participation to the single market. The PM was openly in favour of the hard Brexit option, and decided to call for a general election, hoping to obtain a strong majority in Parliament to back the Brexit negotiation process. However, on June 8th 2017, Theresa May lost her parliamentary majority, and could not avoid a 'hung' Parliament. This result has been interpreted as a clear disagreement of the population over the hard Brexit option.

As a consequence, the flow of events remains turbulent and the future uncertain: as of July 2017, the great majority of the population believed that the country was on the wrong track²⁰. After the second round of negotiations, which took place from 17 to 20 of July 2017, the UK and the EU representatives drafted a joint technical note on their positions on citizens' rights²¹. The EU chief negotiator, Michael Barnier, confirmed that there is a 'fundamental

16 448 versus 75.

17 The Government introduced this Bill following a decision of the Supreme Court that an Act of Parliament is required to give notice of the UK's decision to withdraw from the European Union. The decision is: *R (Miller) v Secretary of State for Exiting the European Union* [2016] EWHC 2768 (Admin), <http://www.bailii.org/ew/cases/EWHC/Admin/2016/2768.html>.

18 Kaithan (2017).

19 In this situation, the UK could have been leaving the EU with or without a 'free trade agreement' (FTA).

20 Ipsos Mori, July 2017.

21 European Commission 2017.

divergence' on how best to guarantee the rights of citizens, the rights of future family members and the exporting of certain social benefits²².

3. The Campaign: Immigration and the Welfare State

Anti-immigration sentiments have been identified as a key variable to understand the reluctance of some countries regarding the EU integration process²³. Indeed, the public debate preceding the Referendum was mainly focused on the three key themes²⁴: i) border controls and immigration, in terms of both flows and admission criteria, ii) the UK Welfare State, in particular the burden produced by benefits to foreigners on the government budget, and on the National Health System (NHS), iii) the law-making process and sovereignty²⁵.

Other factors, such as housing pressure, inequality, and discontent, affected the vote, but the three listed above were the core of the discussion and at the centre of the media's attention. This paper analyses the first two issues, while the third one is left to further research.

3.1. *From immigration control to limitations for the free movement*

During the early 2000s, the British Labour government, together with other Northern countries, embraced a very liberal position for the mobility rights of citizens from the new Member States, the Eastern European countries. While the other EU-15 member states made use of transitional arrangements to manage immigration from these Countries, allowing for restrictions of worker mobility for up to seven years, the UK opted for a complete openness of the borders. As a consequence, the net migration from EU countries quadrupled in 2004 and grew in intensity over the following years. The 2008 economic crisis has surely reduced the mobility flows, but it was not a stopping factor for immigration. Indeed, during the period 2008-2012, EU immigration decreased, but did not collapse to zero (see Figure 1).

²² Herszenhorn et al. (2017).

²³ De Vreese, Boomgarden (2005), pp. 59-82.

²⁴ See, for instance: http://www.voteleavetakecontrol.org/why_vote_leave.html; <http://leavehq.com/why.aspx>; ; <https://www.ipsos-mori.com/researchpublications/researcharchive/3748/Concern-about-immigration-rises-as-EU-vote-approaches.aspx>.

²⁵ See *What the papers said: a referendum special*, British Journalism Review, vol. 27(3), pp. 19-23.

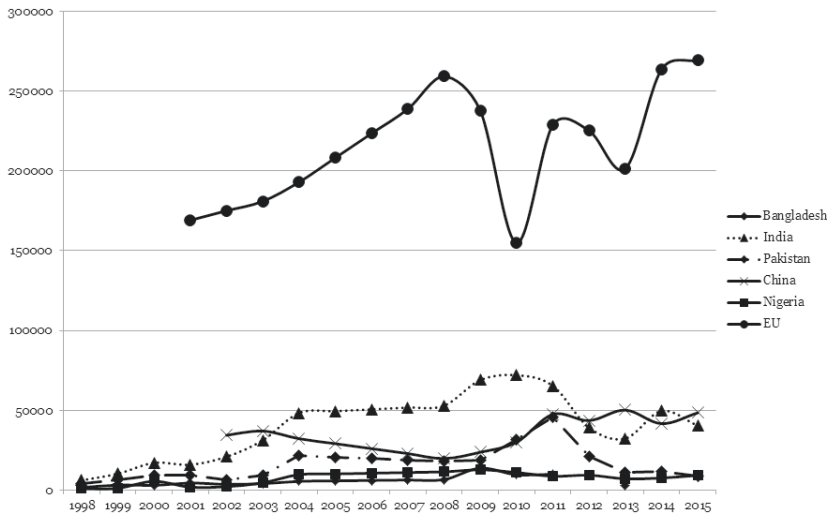


Figure 1: Immigration to the UK.

Source: Authors' own elaboration on Eurostat data.

One of the main drivers for the relocation decision has been identified as the gaps in wage levels and unemployment rates between the EU countries, in particular after the accession of new Member States in 2004²⁶. The freedom of movement acted as a mechanism to cope with such differences, and to respond to economic shocks. Attracted by the promise of higher wages, young generations living in countries with high youth unemployment reached the UK, looking for a job or better earnings. This has also produced many consequences for the population composition and living conditions across Europe, in particular in large cities and the suburbs surrounding them.

An analysis of the British history of the last fifteen years shows that a social and economic disproportion has been produced between the different groups of the population, which have unequally gained from the openness of borders. This is usually considered as the main reason why the UK has completely changed its attitude towards labour migration. Indeed, for migration to have a positive impact and be socially and economically sustainable, it would be necessary for all the strata of the population to perceive the benefits and the potential gains linked to immigration, such as demographic growth and skills acquisition. The legitimacy of the freedom of movement relies on the

26 Portes (2016b). Missing data (2005/2007) was imputed with linear interpolation.

assumption that mobility is beneficial for the “single market” operations and for the EU integration process, as well as for the economy and society of both sending and receiving countries.

Nevertheless, since the early 2000s, Britain has been facing a clash between the strategies for the integration and the admission of new immigrants. The fear of immigration generated the decision to adopt some “fortress policies”, designed to both deter irregular migrants from living in the territories, and to implement strict border-control measures. Since 2010, the UK government has decided to place more emphasis on inland immigration controls and border controls: new measures were implemented to both tighten sanctions in case of expulsion, and to restrict the access of migrants to welfare benefits. The coalition government put unlawful migration at the top of the list of severe issues for the country, and opted for an approach based on deterring, controlling and criminalizing undocumented migrants²⁷. To cope with the concerns related to the large number of unlawful migrants²⁸, in 2012 the government started to consider a change in immigration laws, aiming to both sharpen the expulsion rules and to find deterrents for immigrants either entering or staying in the country. The outcome of these reform processes are the 2014 and 2016 Immigration Acts, which aim to maximise the benefits from migratory inflows, and minimise the costs related to them.

After the victory of the Conservative Party in the 2015 general election, the free movement right of EU citizens, protected by Treaties since the inception of the European communities²⁹, has been put into serious discussion. The government considered the high number of votes for the anti-EU party UKIP as a clear sign of a general disaffection with traditional political parties, and that this was due to a “deadly” combination of Euroscepticism sentiments, anti-immigration feelings, and welfare benefits accession rules³⁰. The fallout of the Referendum should be considered as part of a broader picture regarding the difficulties related to the presence of both lawful and unlawful migrants. Those campaigning for Brexit have long argued that EU membership prevents the government from delivering its pledge to reduce the presence of immigrants.

27 Partos, Bale (2015).

28 Office for National Statistics (2015).

29 Freedom of movement for persons and workers is a founding EU principle safeguarded by EU primary and secondary law: now article 21 of the TFEU and Directive 2004/38/EC.

30 This situation was yet clear after the European elections in 2014. See Treib (2014), pp. 1541-1554.

3.2. *Free Movement and Welfare State*

The freedom of movement of individuals also generates fundamental concerns about the sustainability of the welfare system in those EU countries which receive workers. The open access of foreigners to the labour market clashes with the traditional nature of welfare systems, built on a social and economic pact between different generations, established under the auspices of national sovereignty.

The formation of the social states during the 20th century hinged on the recognition of nation-states as “communities of destiny”³¹, based on a pluralistic vision of human society and on the fair distribution of wealth among each social category. The translation of this view is the development of citizenship as not only civic and political but intrinsically social³². The building of the Common Market and then the mobility of workers among countries have implied a change in the State sovereignty, firstly because it limits the control over the people residing in the territory, and secondly because it forces the Member States to also give access to social benefits to those EU citizens who are in the country for reasons of work or study³³.

During the 2010 election campaign, the freedom of movement became one of the most politicized issues in the UK, and so it is not surprising that those parties against the free mobility of EU citizens obtained a large consensus. The issue that raised the greatest concern in the British public, and gained attention in the political debate, was the possibility of “welfare tourism”, i.e. the relocation of EU citizens to the UK with the purpose of accessing more favourable non-contributory benefits. This, together with rising prices in the housing market, and the overpopulation of semi-urban and rural areas, created the perception of immigration as a public concern. However, it was clear that migration from EU countries, although in smaller figures than immigration from other countries, could not be restricted. The former Home Secretary, Theresa May, announced a plan to reduce net migration to the “ten of thousands” before the end of the parliamentary term. In such a context,

31 As Milward, Sorensen (1993), p. 4 expressed European states embarked on an enterprise of systematic intervention in economic and social life with « the express purpose of shaping and controlling their national destinies. » See also Milward, Brennan, Romero (2000), *passim*.

32 This view derives mainly from the formulation of Thomas Humphrey Marshall in his essay Marshall (1950). For a contemporary discussion of Marshall’s conclusions see: Stephens (2010), pp. 512-525; Dean (2013), pp. 1-18; Garland (2015), pp. 622-628.

33 Giubboni (2006).

the inability to control the admission of EU migrants was blamed as the true source of the British migration problems³⁴.

An attempt to address this situation clearly required a tightening of the rules to access welfare benefits, restrictions on labour market participation, and changes in the freedom of movement for EU workers, and various reforms were implemented in this direction. In 2014, the government changed the removals and appeals system, and prevented the abuse of Article 8 of the ECHR, preventing unlawful immigrants to access benefits and public services. The 2015 general election revealed the need to overhaul the migration system with a reform of the rules around the eligibility of non-British citizens for social benefits. The former PM, David Cameron, used two main strategies to address the problem: first he proposed a list of reforms to the European Council, and then he used this new settlement with the EU partners as a milestone for the campaign to keep the UK in the EU. At the heart of these negotiations, there was the introduction of special restrictions on welfare benefits eligibility for EU workers settled in Britain. On February 19th, the European Council agreed on two main reforms: child benefits could be linked to the conditions of the Member State where the child resides; and changes to Regulation 883/2004, containing social security coordination rules. However, the general commitment towards free movement and anti-discrimination remained untouched during the negotiations. The restrictions proposed acted as an “emergency brake” to work only in a period of mass immigration and not generally as a stable system.

At the European level, the UK has been granted the power to prevent EU citizens from accessing welfare benefits. A judgement of the European Court of Justice ten days before the Referendum (14 June 2016), has acknowledged the power of the British government to restrict access to social security benefits for EU citizens³⁵. This decision was the final step of an infringement procedure by the European Commission against the UK, due to the rules allowing access to child benefits only for EU citizens with a long residence history in the country. The judgment adopts a clear pro-state reading of the EU rules on freedom of movement and access to social benefits, while at the same time sends a message that such rules do not infringe the state’s freedom to regulate access to its social security system.

³⁴ Paul (2016).

³⁵ ECJ, Judgment of 14 June 2016, Case C-308/14, *European Commission v. United Kingdom of Great Britain and Northern Ireland*. For a comment see Costamagna (2016).

From an ex-post perspective, one could say that the attempt to retain the UK in the EU through the concession of some powers, did not work effectively. However, it puts a new focus on the problem of the compatibility between intra-EU mobility rules and the access to national welfare spaces. The Court seemed determined to make its voice heard on such a topic, and to offer a clear-cut response to some of the arguments put forward by the Leave campaign. Nevertheless, the Court should have adopted a more cautious and fine-grain approach. The judgement originates from an infringement procedure directed against benefits established in legislative measures and able to be applied in a wide array of different cases. Therefore, the judges should have avoided giving a Member State such a complete discretion over a topic that is clearly a European-level issue. In the reasoning, there was no reference to the principles of solidarity and EU citizenship, as it was stated in other similar cases.

In any case, both the judgement and the situation created after the Referendum vote show the nature of an issue that is first and foremost political, and only marginally legal. The decision presents some shortcomings and logical fallacies in some paragraphs, as well as a general lack of clarity. These are due to the difficulty to solve an issue conditioned by inter-governmental decisions and political aims.

Indeed, the complications faced by the Court emerged clearly in the following statement: the “need to protect the finances of the host Member State justifies in principle the possibility of checking whether residence is lawful when a social benefit is granted in particular to persons from other Member States who are not economically active”. Despite this statement, the judgement does not contain any evaluation of the costs and benefits of the EU’s free movement regime, and particularly of the burden of this freedom for the societies in both sending and receiving member states.

4. The facts: a data analysis³⁶

This section aims to examine available data on immigration and the welfare state, and to analyse whether the fear of the public opinion on the impact of EU membership on the UK economy are misplaced or not. The main sources of the data used are Eurostat, the UK Office for National Statistics (ONS),

³⁶ See also Barbone, Green, Speckesser, Broughton (2017).

and the UK Department for Work and Pensions (DWP), who publish their databases online.

4.1. *Migration Flows*

Immigration is an umbrella term that includes groups of individuals living in a country which is different from their country of birth. These individuals might have different characteristics and might be involved in various activities, from unlawful immigrants, to students participating in short or long term courses, to EU citizens living and working in the UK under the protection of the freedom of movement regulation. Official migration flows statistics count all individuals who establish, or intend to establish, their usual residence in a Member State for a period of at least 12 months, having previously been resident in another Member State or a third country³⁷, following the definition provided by Article 2.1(a), (b), (c) of Regulation 862/2007.

Table 1 reports the total migration flows to and from the UK over the period 1998-2014, separated into immigration, emigration, and net immigration. Net immigration is calculated by deducting the emigration figure from the immigration one, and is a particularly interesting figure to examine, since it shows the number of individuals that are actually increasing the baseline population of the country. There has been an upward trend in this figure over time, with a sharp increase after 2012 (see Figure 2). The year with the highest net immigration flow was 2015, with 332,269 net immigrants. The figure is generally higher for those coming from EU countries, when compared to China and the Commonwealth countries, with the only exception of 2010 when net immigration from India was the highest flow.

Table 1: Migration Flows to and from the UK

YEAR	IMMIGRATION	EMIGRATION	NET IMMIGRATION
1998	332390	198934	133456
1999	354077	245340	108737
2000	364367	n/a	n/a
2001	372206	n/a	n/a

³⁷ See International Migration Statistics, http://ec.europa.eu/eurostat/cache/metadata/en/migr_immi_esms.htm, July 2017.

2002	385901	305931	79970
2003	431487	313960	117527
2004	518097	310389	207708
2005	496470	328408	168062
2006	529008	369470	159538
2007	526714	317587	209127
2008	590242	427207	163035
2009	566514	368177	198337
2010	590950	339306	251644
2011	566044	350703	215341
2012	498040	321217	176823
2013	526046	316934	209112
2014	631991	319086	312905
2015	631452	299183	332269

Source: Eurostat data. n/a means that data is missing.

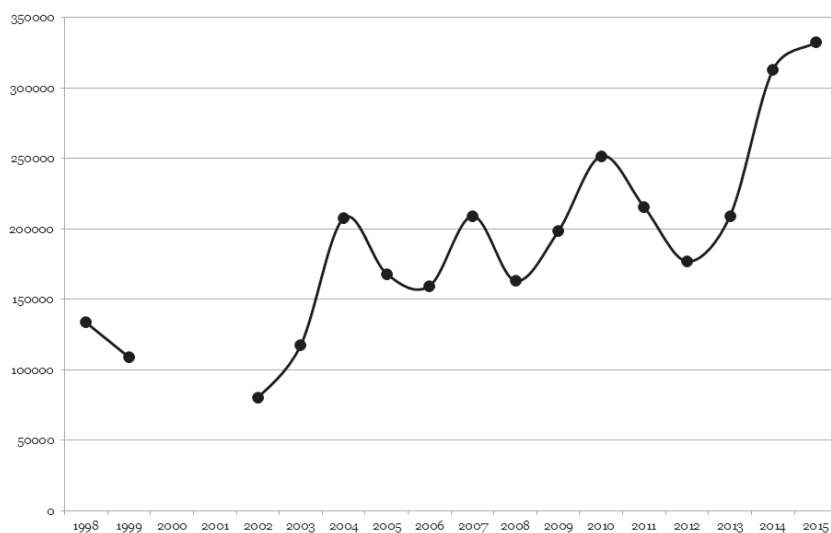


Figure 2: Net immigration to the UK

Source: Authors' own elaboration on Eurostat data.

4.2. Population Analysis

The ONS publishes data on the population in the country, and reports a total of 64,265,000 individuals in 2015 for the United Kingdom, and 58,655,000 for England only. Looking at the data by nationalities, British citizens account for more than 90 percent of the population, while EU nationals for around 5 percent, followed by Asian countries (around 2 percent), other European countries (less than 1 percent), and the rest of the world (1.6 percent). Thus, EU nationals constitute a relevant part of the immigrant population of England (3.2 million), but the proportion is quite low in absolute figures. Total net immigration constitutes less than 0.5 percent of the population, and net immigration from the EU-25 Countries accounts for less than 0.2 percent of the population.

It is also important to note that the statistics do not provide information on the intended duration of stay in the country. Research by the UK Home Office³⁸ has shown that a high number of non-British citizens typically leave the UK after a period of up to four years, and that EU-nationals are less likely to stay permanently in the country, often for work-related reasons. Also, EU immigrants are more responsive to changes in economic conditions in their source country, and are more likely to relocate if the conditions in the home country improve. Therefore, even if EU nationals represent a high percentage of the immigrant population, this figure is likely to be more dynamic and subject to changes than the figures from non-EU countries.

Table 2 reports the ten most common nationalities for the non-British population in the UK, in 2015: seven out of ten nationalities are from the EU. Poland is the most represented nationality (916,000), with a figure that is almost three times the number of individuals from the second most represented nationality (India, 362,000).

Table 2: Most Common Non-British Nationalities in the UK

NATIONALITY	TOTAL (1.000)
Poland	916
India	362
Republic of Ireland	332

38 Home Office (2012).

Romania	233
Portugal	219
Italy	192
Pakistan	187
Lithuania	170
France	165
United States of America	161
China	140

Source: Author's own elaboration on ONS data

The EU population in England can then be further separated into four groups of countries, following the ONS classification:

- EU-14³⁹: Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, Netherlands, Portugal, Republic of Ireland, Spain, and Sweden.

- EU-8: Czech Republic, Estonia, Poland, Hungary, Latvia, Lithuania, Slovakia, Slovenia.

- EU-2: Bulgaria and Romania.

- Other EU: Malta, Cyprus, and Croatia.

Table 3 reports the EU population in England separated accordingly. The majority of EU nationals originate from the EU-14 countries, but the figures are only slightly higher than for the EU-8.

Table 3: EU Population in the UK, by Group of Countries

	UK	Percent	England	Percent
EU	3159	4.92	2825	5.22
EU14	1426	2.22	1297	2.40
EU8	1412	2.20	1223	2.26
EU2	299	0.47	283	0.52
Other EU	22	0.03	22	0.04

Source: Author's own elaboration on ONS data. Figures are in thousands.

³⁹ Usually, this group is defined as EU-15, since it includes the United Kingdom as well.

The ONS also collects information on the main reasons for the decision to migrate to the UK, grouped as:

- Work Related: people arriving in the UK for employment reasons.
- Formal Study: people arriving in the UK for education purposes.
- Accompany/Join: people arriving in the UK as spouse of a UK citizen or someone relocating to the UK.
- Other: people arriving in the UK to get married, to seek asylum, as a visitor, or for another reason.

Table 4 reports the number of individuals from the four groups of EU countries separated by the main reason for relocation: the main motivation for EU nationals is typically employment, followed by accompanying a spouse. While employment is the main driver for all of the groups, the proportion of individuals indicating this reason relative to the other ones is substantially higher for the EU-8 countries. This is likely to be related to the difficult economic situation of these countries. However, it is not possible to distinguish whether those immigrating for work-related motivations have already received a job offer or intend to look for one upon arrival.

Table 4: Main Reason for Relocation to the UK

	Work Related	Formal Study	Accompany	Other
EU	1490	773	1726	674
EU14	553	207	421	148
EU8	763	79	313	103
EU2	169	20	72	17
Other EU	6	4	8	3

Source: Author's own elaboration on ONS data. Figures are in thousands.

4.3. Benefits Expenditure

Figure 3 shows the National Insurance Number (NiNo) registrations for “overseas nationals” when entering the UK labour market for the first time over the period 2002-2016. This registration is a requirement in order to work, and it allows workers to pay taxes. EU nationals have the highest percentage overall of NiNo registrations (59 percent), showing an increasing trend over time, followed by citizens of Asian countries (22

percent). Interestingly, the EU numbers over the period show a trend similar to the net-immigration figures (Table 1), and this suggests the validity of considering employment as the main motivation for individuals relocating to the UK. Figure 4 shows the percentages of people living in households with very low work intensity, i.e. households where the working age members work less than 20% of their potential working time (as defined by Eurostat⁴⁰). EU nationals have a lower rate than UK citizens and non-EU nationals, and thus show a significantly high rate of participation in the UK labour market in terms of work intensity.

Table 5 reports the number of working-age benefit claimants by type of benefit and nationality: overall, there were around 5,130,000 claimants in the country in 2015. Of these, 93 percent are UK citizens, and only 2 percent are EU-nationals. The most frequent benefits are employment-related, namely the Job-Seeker Allowance (JSA) and the Employment and Support Allowance (ESA), which support unemployed or less-able individuals during the job search process. Of the total benefits distributed by the government, 60 percent are given to UK citizens for this purpose. Figures related to EU-nationals do not seem to suggest that a particularly high proportion of benefits are allocated to them: employment-related benefits account for only less than 2 percent of the total, and other benefits for less than 1 percent. These figures appear particularly low, especially if compared with the corresponding NiNo registration statistics. Furthermore, the different groups of EU countries do not show significant differences in the benefit-claiming behaviour: in particular, EU-14 and EU-8 have similar percentages of claimants. Thus, it seems unlikely that EU-nationals could create a heavy burden for the government budget.

40 See http://ec.europa.eu/eurostat/statistics-explained/index.php/Glossary:Persons_living_in_households_with_low_work_intensity.

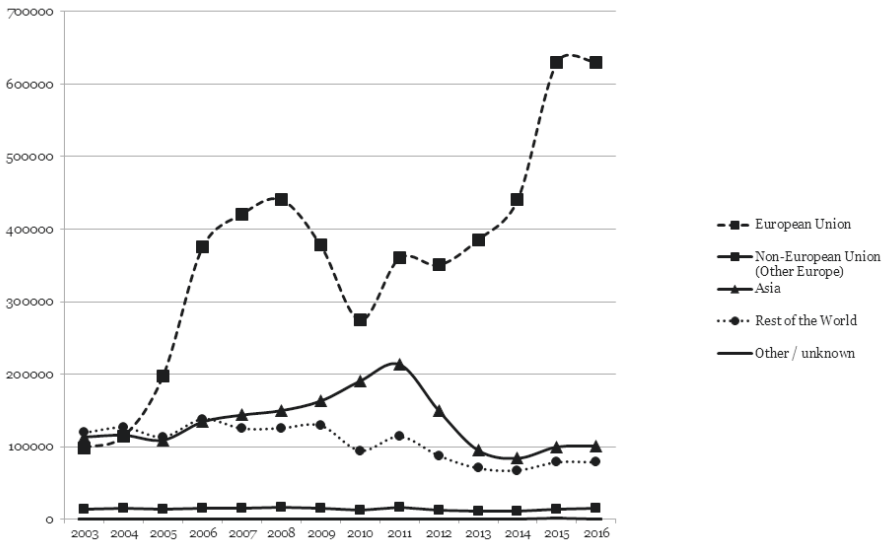


Figure 3: NiNo Registrations
Source: Author's own elaboration on DWP data.

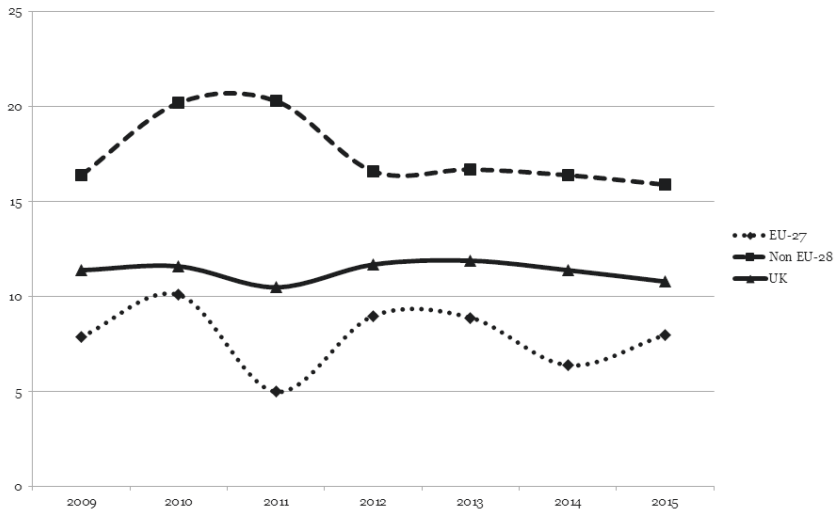


Figure 4: People in household with very low work intensity
Source: Authors' own elaboration on Eurostat data.

Table 5: Working age claimants by nationality and benefit type

NATIONALITY	TOTAL	PERCENT	EMPLOYMENT RELATED BENE- FITS (PERCENT)	NON EMPLOYMENT RELATED BENEFITS (PERCENT)
All	5129.52	100.00	64.70	35.30
UK	4758.3	92.76	59.96	32.80
European Union EU15	55.33	1.08	0.79	0.29
European Union EU8	50.25	0.98	0.70	0.28
European Union EU2	5.1	0.10	0.07	0.03
European Union Other	3.28	0.06	0.05	0.02
Other Europe	17.85	0.35	0.24	0.11
Middle East and Cen- tral Asia	37.89	0.74	0.56	0.18
East Asia	3.44	0.07	0.03	0.03
South Asia	76.54	1.49	0.80	0.69
South East Asia	7.71	0.15	0.08	0.07
Sub-Saharan Africa	72.66	1.42	0.89	0.52
North Africa	13.32	0.26	0.19	0.07
North America	3.52	0.07	0.04	0.03
Central and South America	13.2	0.26	0.17	0.09
Oceania	1.86	0.04	0.02	0.01
Unknown	9.29	0.18	0.12	0.06
Non UK	371.22	7.24	4.74	2.50
	7.2%			0.01

Source: DWP data. Figures in thousands.

In summary, this section has provided an analysis of the available data on migration flows to and from the UK, the reasons driving it, and the access to welfare benefits of the EU-nationals. Migratory flows to the UK show an increasing trend over the last decade, and citizens of some Member States, such as Poland, Ireland and Romania, tend to be over-represented. Nevertheless,

the percentage of EU-immigrants remains relatively small compared to the overall population. The main driver of the relocation decision is work-related, and indeed there are a large number of EU-citizens officially registered for NiNo numbers. Finally, the benefit claim rate of other Member States' nationals constitutes only a small fraction of the overall benefit expenditure, and it is unlikely to generate particular budget issues for the UK government.

5. The Immediate Outcome of the Referendum: the British Economy and a discussion of the Leaving Process

Harsh economic predictions were linked to a Brexit decision by the majority of the experts⁴¹, both in the UK and abroad. S&P, a ratings agency, forecasted that the leave vote would reduce GDP growth by 2.1 percentage points over the period 2016-2018⁴².

Indeed, just after the results were announced, the value of Sterling and the stock exchange were dramatically hit on the markets, due to investors' fears on the economic future of the UK. Sterling dropped to a three-year low of €1.107 in October 2016, and, after rising again over the year, dropped to 1.10 in July 2017. After the initial period of uncertainty though, the UK economy has been shown as being substantially stable over time, with a steady continuous growth of GDP, and the employment rate hitting its highest level (74 percent) since 1971⁴³. However, the impact of the referendum on some key economic indicators will only be observed either later on this year or in the longer term, i.e. after at least some years. These include house prices, the service sector performance, migration flows, investment by insurance companies, pension funds and trusts, and the composition of the population. Thus, it is still too early to assess the true impact of the Referendum on the economy.

Furthermore, the "Leaving" process is still unclear. A number of possible policies and reforms have been discussed, with the publication of some 'white papers' by the government, and immigration has been revealed again as the most important issue on the table: the PM, Theresa May, stressed that

41 For a review, see Armstrong, Portes (2016), pp. 2-6.

42 Source: Lewin (2016); Thomas (2016).

43 Source: *ONS Statistical bulletin, uk labour market* (Nov 2016), <http://www.ons.gov.uk/employmentandlabourmarket/peopleinwork/employmentandemployeetypes/bulletins/uklabourmarket/november2016>.

immigration rules and border controls were more important to the country than obtaining access to the EU single market. One of the main objectives of the Conservative Party is to avoid foreigners taking “jobs that British people could do”, said the PM, and to reduce immigration to so-defined “sustainable” levels⁴⁴.

These proposed new policies might be counterproductive for the British economy, as various experts have suggested over the past weeks. Indeed, Broughton et al. (2016)⁴⁵ have shown that there is no evidence of immigrants ‘stealing’ jobs from UK workers, and that EU applicants tend to be more successful in some jobs due to a lack of motivation and skills in British applicants. Therefore, a reduction in immigration flows to the UK, due to either new rules or a perception of an unwelcoming environment, might be damaging for many sectors. It can also reduce economic growth, since immigration flows can increase the size of the economy, creating new jobs and increasing national GDP. Indeed, recent research⁴⁶ has shown that the displacement effect of British nationals due to immigration is quite small in magnitude, and that it dissipates over time: the labour market tends to expand over time, and adjusts to the new workforce availability.

6. The likely consequences of the Referendum: a long journey to find new approaches to EU-integration and immigration

The dynamics of the Referendum process clearly show a drastic shift in the perception of migration and the role of immigrants for both the economy and society. It is difficult to identify one factor as the main cause of such a change, since many are likely to have contributed to it: the increase in house prices, the 2008 economic crisis and the cut in government spending that followed it, the numerous terrorist attacks which have happened over the past ten years, and many others, including sociological and psychological determinants. What is certain is that this change has happened, and that nowadays immigrants are considered by both the population and the UK government more as an issue to be solved rather than as an asset for the country. Indeed, the last ten years have seen an increase in regulations on border controls, and various attempts

⁴⁴ Mance (2017).

⁴⁵ Broughton, Adams, Cranney, Dobie, Marangozov, Sumption (2016).

⁴⁶ Home Office (2014), Home Office.

to limit access to welfare benefits from non-British citizens, even though the data illustrated show that EU nationals do not constitute a particularly high burden for UK public expenditure, while they contribute to the economy with their spending and with more than £3bn in taxes⁴⁷.

The Brexit decision has also raised new questions and issues related to EU integration, and the aim of an “ever closer Union”⁴⁸. It is indeed the first case in the history of this Union of a country deciding to opt out. This will inevitably have consequences, not only for the nature of the EU but also for the protection of the fundamental rights of European citizens⁴⁹.

This is strictly related to the yet-to-be-defined shape of the relationship between the UK and the EU. On this side, the possible options are a number of ‘fixed-price’ menus as illustrated by the Economist⁵⁰, some of which are not currently discussed on the media. The first option is a full-EU membership, with a rejection of the Referendum results. The second and third options are models of quasi-integration, such as those followed by Norway, Iceland, and Liechtenstein, and Switzerland, which are part of the European Economic Area (EEA) or the European Free Trade Association (EFTA). These two models require the acceptance of all the four freedoms of movements, including people, a full contribution to the EU budget, and limitations in terms of the law-making process. However, the new PM has already made clear that these models will not be considered as a good enough solution for the UK⁵¹. Not surprisingly, this is mainly related to the strong willingness of the government to obtain complete control over immigration inflows, and to refuse the freedom of movement that those models would impose. Other options are the Turkish model, with a custom union for specific goods, or trading under the WTO terms, with the consequent difficulties related to the setting up of trade tariffs. These options are likely difficult to be defined and implemented, and could cause harm to the UK economy, since they could prevent the UK to access free-trade deals with third countries.

Thus, a new model will need to be developed over the next two years, and this will also inevitably shape the structure of the rest of the EU itself.

Furthermore, the UK will need to develop a new internal approach to im-

47 Portes (2016c).

48 Craig (2016), p. 12.

49 Alston, Weiler (1998).

50 The Economist (2017).

51 Pisani Ferry, Rottgen, Sapir, Tucker, Wolff (2016).

migration, compatible with both the standards of the Western Nations, and with the concerns of the population. As Portes has recently noted⁵², the government could opt for a “light touch” system, with a cap on numbers and limits to benefits access. However, this seems unlikely considering the increasing trend of immigration controls that have characterised the country for the last decade. At the other extreme, the same rules currently applied to non-EU immigrants might be extended to EU-nationals as well. The only certainty is that some degree of selectivity will be applied, but this might discourage immigrants from trying to reach the country. Also, higher levels of selectivity might leave important economic sectors with a shortage of skills and workers, while, as our data analysis has shown, the likely reduction of benefits expenditure for EU-nationals will not save a substantial amount of economic resources. Over the next few years, both the UK and the EU will face dramatic changes, both economically and politically, and these will have a profound impact on the destinies of each country, as well as of the Union. To maintain internal cohesion and unity, either within the country or in the EU area, Euro-sceptic sentiments and anti-immigration feelings will need to be addressed in a way that public opinion would find convincing.

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⁵² Portes (2016a).

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REPRÉSENTATION, PERCEPTION DE LA CRISE ET MODIFICATION DE LA «SÉCURITÉ SOCIALE». ENTRE PRÉDICTION ET ANTICIPATION, QUE SIGNIFIE AGIR DANS UN MONDE INCERTAIN?

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Le mot « crise » est un mot emprunté au vocabulaire médical. De fait, rappelons-le, « crise » et les mots apparentés viennent du grec *krinein*, qui signifie « juger, juger comme décisif ». Dans la médecine hippocratique, le sens médical de la crise désigne l'étape d'une maladie au cours de laquelle un changement subit se produit, et dont les conséquences peuvent être salutaires ou fatales. La crise est le moment où la maladie rend son jugement : *in quo morbi judicium*. On parlera ainsi de crise cardiaque ou de crise de nerfs. Très vite, le mot « crise » a ainsi fait partie, tout comme le mot « régime » qui glissa de la diététique vers la politique, des nombreuses métaphores médicales et du soin exportées pour éclairer « le corps social » et démêler des réalités sociales ou politiques équivoques. En effet, la crise, la maladie, etc. posent et imposent une difficulté inhérente à l'art d'interpréter. Il s'agit de discerner, dans des situations équivoques, pour délibérer et juger au risque de l'erreur. Ces métaphores organiques seront convoquées pour penser, interpréter les signes et la dynamique du corps social et du corps politique (crise financière, crise des valeurs, crise de la conscience européenne). Elles présupposent, ce qui ne va déjà pas de soi, de faire du social ou du politique un organisme.

L'intérêt de cette métaphorisation tient au fait que « juger » de l'histoire et de son cours est devenu un exercice difficile, d'autant que sont devenues suspectes les philosophies du sens de l'histoire. Prendre soin de ce qui y germe ou s'inquiéter de ce qui s'y nécrose, entre ce qui est fin du monde, fin d'un monde, et nouveau monde, est une tâche délicate. Juger ce qui est décisif ? Avec la fin des idéologies qui promettaient des lendemains qui chantent (dans les philosophies de l'histoire et les religions séculières) apparaissent d'autres figures promettant d'orienter en temps de crise et dans l'incertain. Le prophète de malheur dont le coup de force annonce l'apocalypse (le discours du catastrophisme éclairé). L'omnipotente figure de l'expert qui revendique fonder indubitablement et en vérité des choix relevant de la justice politique, entretenant une confusion entre déduire et décider. La démocratie participative et avec elle l'inventivité démocratique d'un art de décider (*focus group*,

conférence de consensus, cellule de conseil, etc.) dans un monde incertain et complexe. Sur son flan, l'expertise apprivoise l'avenir incertain dans le langage de la planification et de la programmation, de la prévision et de la futurologie.

1. Les experts de la crise et la crise de l'expertise

La crise dramatise le moment de la décision ou du jugement : il faut trancher parce qu'il y a là une rupture, un déséquilibre, une discontinuité. C'est le moment décisif. On ne décide peut-être pas de la crise mais la crise, quant à elle, impose de se décider. Le jugement médical (interpréter les signes équivoque d'une crise) sert ainsi de paradigme pour penser et élaborer le jugement social voire judiciaire, éclairant d'autres décisions en situation marquées par de l'incertitude, du flottement, de l'ambiguïté. C'est une analogie qui établit le rapprochement entre médecine, droit et société. La prise de décision dans le cadre de la crise est toujours l'exercice d'une forme de jugement en situation concernant des relations. Ainsi ce travail de métaphorisation engage et mobilise une intelligence interprétative. Cette herméneutique des signes est capable de produire une intelligence diagnostic sur la situation examinée, sur la qualité des relations de soins mutuels engagées ou détériorées par l'organisation et le pilotage de nos manières de faire monde (aujourd'hui le développement de la civilisation technologique accompagné par ce que Sandel nomme « la société de marché »). De la sorte, dans l'histoire une métamorphose se prépare dont nul ne sait si elle est un tournant (Hans Jonas et *le principe responsabilité* ouvrant sur une responsabilité pour les générations futures), un choc (cf. *le choc des civilisations* de Samuel Huntington), ou un effondrement (*Effondrement*¹ est le titre du livre de Jared Diamond). Des savoirs, une sémiologie, des connaissances théoriques sont mobilisés en vue d'une décision relative à une situation de crise envisagée éventuellement comme un texte : le texte du corps, le texte littéraire, le texte de loi, le texte du corps social et la texture de l'histoire en train de se faire. Ce qui explique la réunion, dans ce volume, de sciences ou disciplines interprétatives ou exégétiques (droit, littérature, sciences humaines). Tout comme la crise du corps malade appelle un diagnostic en vue d'une thérapeutique, on fait l'hypothèse que l'état de crise du corps social exigerait un diagnostic en vue d'une thérapeutique politique.

1 Diamond (2009).

Ce diagnostic, on le délègue aux sciences, - sciences de la nature lorsqu'il s'agit du climat ou de l'érosion de la biodiversité ; - sciences sociales, lorsqu'il s'agit de migrations, d'économie ou d'enjeux sociétaux comme le mariage homosexuel, les relations entre genres, la métamorphose des mœurs, etc.

Dans nos sociétés, que l'on dit réflexives, c'est aux sciences, et notamment aux sciences humaines et sociales (psychologie, histoire, sociologie et l'économie si on se souvient que cette dernière est aussi une science sociale) qu'est confiée la tâche de produire une réflexivité sur la réalité sociale et une intelligence de la crise. Le rôle de l'expertise des sciences de la nature (l'exemple des experts sur le changement climatique qu'est le GIEC) et sciences humaines dans la décision politique, et dans nos sociétés déboussolées quant au sens et l'orientation de ce qu'il y aurait à faire, doit être discuté².

Entre la prédiction qui relève du discours scientifique (conception intellectualiste de la décision) et l'anticipation qui relève du rôle de l'imagination et de la volonté politique (conception volontariste de la décision), se trouve deux réponses à la question : que signifie agir dans un monde incertain ? On peut vouloir valoriser la prévision en se concernant sur le possible ou le probable ; on peut encourager l'imagination en travaillant à de l'imaginable. Actuellement, dans le conflit des interprétations concernant le monde qui vient, c'est encore le langage de la prévision travaillant sur des scénarios possibles ou probables qui l'emporte. En effet, l'utilisation d'une science appliquée paraît pourvoir nos sociétés désorientées d'un sens définitif, d'une vérité indubitable ayant le pouvoir de cautionner ce qui devrait être. Ceci aussi bien dans une expertise *a posteriori* qu'*a priori*. L'expertise *a posteriori* enregistre des transformations et des évolutions sociales observables qui prétend dire ce qui doit être et ce qui devra être (demain), anticipant parfois exagérément sur les mouvements des sociétés, au nom de ce qui est déjà (aujourd'hui ou hier) dans les mots d'une logique de la prévention (de risques déjà connus). L'expertise *a priori*, grâce à un travail de modélisation, anticipe l'avenir (demain) à partir de structures immémoriales (de tous les temps) par les simulations, l'anticipation par les modèles, les analyses de structures qui, au-delà du superficiel social à décrire, font apparaître des invariants) dans une logique de la responsabilité ou de la précaution. Or, si l'on se souvient de Weber opposant le savant et le politique, la figure de l'expert, si elle éclaire les choix de société ne peut tenir lieu seule de décision publique, car les choix de société ne lui appartiennent pas mais appartiennent, - et l'expert en est un -, aux

2 A titre d'exemple on pourra lire Fassin (1999), pp. 89-110.

citoyens. On pense ici au rôle dévolu au discours des expertises économiques ou sociologiques dans les politiques publiques concernant l'éducation, le traitement social du chômage ou la cartographie de la couverture hospitalière par exemple ou au rôle des psychologues/psychiatres dans les affaires criminelles pour mettre l'accent sur des capacités d'être en relations, plus ou moins altérées.

Ainsi, au-delà de la réflexion d'épistémologie des sciences politiques portant sur l'expertise et sa dérive en expertocratie, l'insécurité sociale qu'engendre la crise en appelle à un enjeu philosophique se demandant que signifie prendre soin d'un monde vulnérable. Cet enjeu philosophique voit émerger une façon de répondre pratiquement à cette insécurité sociale dont on fait le diagnostic par une attention à des pratiques de soins apportées aux vulnérabilités. On le trouve sous la rubrique générale d'une philosophie du soin (allant de l'éthique du *care* à l'ontologie relationnelle) résolument anti-utilitariste et plutôt convivialiste.

Retenons de ce qui précède que pour percevoir et répliquer à un état de crise, il faut commencer par construire un cadre interprétatif qui mobilise la possibilité de l'interprétation. La perception de la crise, si elle est tonalisée par un sentir profond phénoménologiquement liée à une forme de *compréhension symbiotique*³ (on sent la crise avant de la percevoir/de la savoir sous la forme d'un « malaise dans la civilisation ») est, en fait, aussi une construc-

3 Tout d'abord, cette compréhension renouvelée serait caractérisée par une attention à l'expérience de la coprésence du vivant humain avec les vivants, de sorte que le mot vulnérabilité, dans le champ linguistique serait la tentative d'exprimer sur le mode d'une *compréhension symbolique* – avec le risque de perte que cela comporte, une coprésence sentie, éprouvée sur le mode d'une *compréhension symbiotique*. On pense ici à cette idée de Erwin Strauss pour lequel le sentir est plus profond que le percevoir, et que l'idée de vulnérabilité comme modalité originaire du sentir explicite. Expérience pathique que le mot « vulnérabilité tente avec justesse de ne pas trahir. Il ne veut pas trahir l'expérience qu'il cherche à traduire et qui porte sur la relation originaire du vivant humain dans et avec les non humains et la nature. Si le passage du sentir au connaître suppose une métamorphose de la communication avec le monde, le prix à payer pour cela est que la connaissance échappe à la communauté fugace de l'instant en y substituant une distance objectivante. Dans ce moment que constitue pour nous notre « malaise dans la civilisation en crise, le mot de vulnérabilité veut retrouver ce sentir d'avant le connaître qui est la condition première du connaître même si celui-ci l'oublie. La connaissance détruit ou distancie la connivence. La vulnérabilité est peut-être la tentative de donner un nom à ce qui est alinguistique : la coprésence et une communauté fondamentale immédiate du vivant humain avec les vivants antérieure à toute connaissance.

tion sociale et culturelle. Cette dernière est élaborée dans une forme de *compréhension symbolique* dont les mots d'« insécurité sociale » ou de « vulnérabilité » sont aujourd'hui les catalyseurs. C'est dire par conséquent qu'une crise est à la fois dans la réalité (on la sent ou pressent) et dans le jugement porté sur la réalité jugée (on la juge, se la représente : la crise en ce sens manifeste d'une discordance entre la réalité et la représentation qu'on en avait forgé jusque-là). Avec toute la difficulté de savoir si ces signes sont univoques – on tendra à ce qu'ils le soient – ou équivoques – prêtant alors à polémique et conflits des interprétations. La crise ou l'insécurité sociale actuelle engendre un conflit des interprétations dans la mesure où il n'y a plus une interprétation dominante qui emporte le régime général de la signification lorsque s'est effondrée idéologiquement cette domination – la révolution communiste d'hier ou le néolibéralisme d'aujourd'hui). La crise, toute crise, c'est vrai aussi pour une crise économique, est ainsi la mise en travail critique des différentes lectures possibles de celle-ci.

2. La crise ? Quelle crise ?

Il faudrait donc répondre à la question : qu'est-ce que l'insécurité sociale ? *L'insécurité sociale*⁴, titre d'un livre de Robert Castel, demandait qu'est-ce qu'être protégé lorsqu'on parle de protection sociale contre les aléas de l'existence. La sécurité sociale est prise entre la *sécurisation* stable et normée des manières de faire monde par des procédures standardisées et fiabilisées (on pense à l'exemple en France de la sécurité sociale comme dispositif d'assistance mutuelle portée par l'Etat sur fond d'égalitarisme, système fort différent de la protection sociale pensée sur un mode assurantielle dans le cadre de l'utilitarisme anglo-saxon) et le *sécurisant* (prendre soin des relations du monde contre le déploiement d'un utilitarisme violent (cf. Martha Nussbaum commentant *Temps difficiles* de Dickens). Une philosophie du soin recherche un principe d'unité capable de faire monde, de maintenir et porter un avenir. Elle le fait dans le prendre soin de (le lien *secure*/sécurisant en psychanalyse) dans et au sein d'une activité technique et sociale qui pense moins en termes de relations qu'en termes de fiabilisation et de maîtrise de rapports fonctionnels mais impersonnels (le sécuriser propre à une société du risque (passage de l'*aléa* au *risque*). La sécurisation par la prévision relève d'une logique des

4 Castel (2003).

dispositifs de contrôle, de surveillance et de fiabilisation qui assure et rassure contre l'imprévisible et les discontinuités vectrices d'instabilités et d'inquiétudes. Mais l'excès de sécurisation produit aussi une crise : le sécuritaire dans l'exaltation verrouillée du dispositif : le refus de l'imprévisible dans la clôture du temps et de ses « surprises ». Le sécurisant relève d'une disposition relationnelle et éthique, qui consiste à donner un avenir à la vulnérabilité en l'accompagnant de façon sécurisante (cf. le lien *secure* et les analyses du philosophe Guillaume Le Blanc), la laissant advenir (permettre à la vulnérabilité de s'ouvrir et de se présenter dans son exposition) au risque de se contenter d'une sorte de bienveillance inopérante.

Il ne s'agit donc pas d'opposer le sécurisant et la sécurisation mais de les dialectiser. La sécurisation risque de se figer dans le discours sécuritaire écrasant de l'extérieur ; le sécurisant est tenté de s'idéaliser dans une sollicitude étouffante de l'intérieur. Il s'agit d'apprendre à sécuriser plus pour être mieux sécurisant ! Notre hypothèse est alors que notre crise (dont nous allons devoir dessiner les traits) qui n'en est peut-être plus une, tant elle dure, tient à ce qu'il y a une hypertrophie du discours de la sécurisation par la *soft law* : la crise est une crise du sens parce que la gestion a pris la place de la direction, ou la gouvernance celle du gouvernement. Le poids des normes, des indicateurs et des certifications et la gouvernance par les nombres (la statistique comme usage normatif de la quantification vient de l'Allemand *Staatistik* qui est devenue une science de l'Etat *Staatswissenschaft*, une arithmétique politique) manifestent une pathologie bridant la créativité des acteurs et des sociétés, tuant leur capacité d'initiative et d'adaptation au temps qui vient (moins penser en termes de perspective que de prospective, de possible, de probable que d'imaginable)...

Les crises sont des vécus dramatiques. Le continuum tranquille et sécurisant devient discontinu et produit de l'insécurité ; la rupture soudaine exacerbe des tensions et met en opposition frontale, parfois jusqu'au drame et la violence, de ce qui jusque-là, était de l'ordre de l'équilibre. Les crises manifestent une série de transformations. En ce qui nous concerne la crise serait marquée par une individualisation jusqu'à l'individualisme, un déclin des collectifs protecteurs, la précarisation des relations de travail, la prolifération de nouveaux risques dans une « société dite du risque ». On pourrait ainsi isoler quelques traits :

- *la crise est la conscience d'une situation historique dont on mesure l'instabilité*, passant de la prévention eu égard à des risques connus à la précau-

tion devant des risques inconnus. Emerge ainsi une société post-traditionnelle ou société du risque (cf. Ulrich Beck) qui exigera d'apprendre à agir dans un monde incertain.

- *de la sécurité sociale à l'insécurité sociale*. Dans un monde qui connaît la globalisation technologique et la mondialisation économique et financière, ce que Hans Jonas place sous la figure d'un Prométhée définitivement déchainé dans une civilisation technologique, la crise met au jour l'impuissance du politique face à des logiques et des puissances internationales (force des entreprises multinationales et discussion sur l'évasion fiscale et la responsabilité fiscale des entreprises à l'heure de la responsabilité sociale des entreprises). Elle met aussi au jour l'impuissance face à la dimension du translocal avec la « crise écologique » qui bouleverse les logiques territoriales et les techniques politiques classiques sur le plan international pour lesquelles un Etat est toujours lié à un territoire alors que nous arrivons à cette situation inédite d'Etats sans territoires (les pays submergés par la montée des eaux) et de problèmes translocaux c'est-à-dire non propres à un territoire.

- *Une crise du pouvoir de l'Etat*. Cela sonne singulièrement en contexte français entre la conception maximaliste de l'Etat (la sécurité sociale comme un système de protection : état de droit et état social) et sa conception minimaliste (la seule sécurité politique et militaire)

- *Le rôle de l'expertise devant des risques technologiques inédits* (cf. ci-dessus).

Face à cette situation d'un monde devenu instable, comment agir, s'orienter et décider ? Nous sommes les contemporains d'un travail d'argumentation et d'interprétation qui a du mal à conclure concernant la portée et la consistance de la situation présente. Juger c'est le plus souvent placer un cas singulier sous une règle qui tient au fait qu'on connaît mieux la règle que le cas (jugement déterminant dirait Kant, jugement d'experts). Mais en situation de crise on connaît mieux le cas (qui en impose par son expressivité, sa complexité et son caractère sidérant) que la règle et on cherche à inventer une règle pour ce cas (jugement réfléchissant dira Kant et avec lui les puissances de l'imagination à l'œuvre dans la prospective, la recherche de l'imaginable). Notre difficulté présente est de décrire de façon *ad hoc* la situation ou ce qui fait dire qu'il y a crise. Il nous appartient de proposer une interprétation de notre situation historique dans de justes narrations. Mais qui a la capacité de raconter notre présent, d'en porter haut et fort le récit plutôt que de le

technocratiser ou de le procéduraliser, d'autant plus si nous vivons la fin des grands récits ? Il nous appartient également de pluraliser le travail d'interprétation et nos narrations, enrichissant nos indicateurs qualitatifs et nous affranchissant des tableurs et des typologies quantitativistes qui s'emparent de notre présent (la croissance, les logiques du marché, les classements des triples AAA des agences de notations, le PIB ou l'IDH, etc.) pour emmurer l'avenir. Un des défis est aujourd'hui de revisiter cette culture de la prévision technoscientifique en la mettant en regard de l'anticipation inventive, qui restaure et reconnaît la capacité d'initiative et d'innovation des acteurs.

3. Imagination et décision

Si nous avons à apprendre à *agir dans un monde incertain*⁵, pour reprendre le titre du livre de Michel Callon, nous devons reconnaître que cette incertitude est en même temps enserrée, voire enfermée dans la cage d'acier non de la loi mais de la norme. Il s'agit de celle que portent les techniques de régulations, de contrôles et d'administration de l'incertain par la force prégnante des programmes, des standards et des protocoles. Tout cela inaugure une bureaucratisation croissante de la vie qui bride la créativité des acteurs, tue leurs capacités d'initiatives, les épuisent ou les dévitalisent. De fait, dans nos sociétés la question de la décision se trouve métamorphosée par quelques traits bien connus : le pluralisme de positions éthiques qui en appelle à la discussion au risque du relativisme ; la complexité des contextes sociotechniques qui en appellent à l'expert au risque de l'idéologique de l'expertise ; le poids grandissant de l'administration du monde vécu au risque de l'enfermement disciplinaire de la question des fins placée sous la domination qu'exigerait la maîtrise des moyens. Nous sommes en ce sens les contemporains d'une crise de la raison pratique qui en appelle à repenser à nouveaux frais les relations entre imagination, éthique et décision.

Aristote caractérisait l'éthique par une réflexion non sur le futur en général, mais sur les futurs contingents. Il y a de l'éthique, et de la politique, parce qu'en direction de ce qui est à venir, il y a une indétermination de l'issue, et un relatif manque de lisibilité quant aux conséquences futures. La sagesse pratique mobilisée dans une décision est exigée parce qu'il y a du non savoir. Elle exige de ce fait un travail de discernement et de délibération pour chercher

5 Callon, Lascoumes, Barthe (2001).

à évaluer ses conséquences et donc à imaginer des possibles. Une opposition paraît alors frontale entre deux modèles de la décision : un modèle volontariste et un modèle intellectualiste. Pour le premier, il y a décision parce qu'il y a indétermination. La décision est donc une prise de risque de la liberté qui, ne sachant pas ce que sera demain, comble par la force vive d'un engagement de la volonté et la fidélité à cette volonté, la faiblesse de ses connaissances. Dans cette perspective, décider c'est vouloir en ayant, en imagination, fait varier des scénarios possibles à vertu prospective, lesquels sont installés dans une mise en perspective, dans une visée. On s'interrogera alors sur ce que peut être cette sagesse pratique - voir aujourd'hui les travaux de M. Nussbaum, d'Amartya Sen - à l'heure de la civilisation technologique. En effet, un second modèle que l'on appellera intellectualiste domine nos sociétés. Prenant le contrepied du précédent, il ambitionne de construire une « science de l'action ». Il tend, parce qu'il observe une certaine régularité dans les phénomènes et une forme de constance, à construire la décision sur le modèle d'un calcul, envisageant l'à venir à partir de la modélisation algorithmique de ce qui s'est passé. Charles Dickens, dans son roman *Temps difficiles* (1854) dénonçait déjà, à la suite de Thomas Carlyle, le caractère dangereusement abstrait d'une science économique vouant un culte aux statistiques au point de négliger la culture des besoins humains majeurs. *Dans cette pièce enchantée, les questions sociales les plus compliquées étaient mises en chiffres, exactement totalisées et définitivement réglées – ou l'eussent été si seulement ce résultat avait pu être porté à la connaissance des intéressés. Comme si un observatoire pouvait être construit sans fenêtres... il n'avait pas besoin de jeter les yeux sur les fourmillantes myriades d'êtres humains qui l'entouraient, mais pouvait régler toutes leurs destinées sur une ardoise et effacer toutes leurs larmes avec un petit bout d'éponge sale*⁶. En déconnectant la science de l'action de sa perspective éthique, cet économisme utilitariste soumet le comportement humain à un calcul ; on en trouve la version récente chez l'économiste anglais Gary Becker, *Economist approach oh humain behavior*, 1976. Ce dernier pose que tout comportement, fut-il très éloigné des préoccupations matérielles, est le résultat d'un calcul coûts-bénéfices que l'on peut expliquer et prévoir. Par exemple, on décrira un marché matrimonial en travaillant à quantifier les coûts ou les avantages engagés pour chaque mariage ou chaque divorce. Décider dans cette perspective ce serait déduire, c'est-à-dire tirer les conséquences d'un calcul des risques ou des probabili-

6 Dickens (1985), II partie, chapitre 15, p. 143.

tés qu'un risque advienne, au sens où l'a développé la théorie des jeux. On tire alors l'anticipation du côté de la prévision, voire de la prédiction dans la prospective, supposant une forme de caractère isonormé du temps. Si nous sommes bien dans des sociétés qui tendent à généraliser cette conception intellectualiste de la décision, laquelle met au jour d'utiles régularités et de légitimes objectivations, il n'y a pas à choisir mais à articuler décider et déduire. Il s'agirait de se demander comment la décision peut-elle demeurer une puissance d'innovation, de créativité pratique maintenant et ouvrant les possibles pratiques dans des contextes très contraints ou du moins très structurés ? Que devient l'anticipation entendue comme mise en perspective lorsqu'elle est disciplinée par la culture de la prospective ?

L'examen des liens entre imagination et décision qu'engage toute anticipation est classique. Il tient au fait que si nous avons à décider c'est en raison de la connaissance incertaine que nous avons du lien existant entre le temps de la décision et celui de ses conséquences plus ou moins lointaines. Dans le cadre de ce qu'Ulrich Beck nous a appris à appeler « société du risque » cette question est même devenue topique, passant de l'échelle individuelle à l'échelle collective. Avec la *modernisation réflexive de la société industrielle*⁷, la tradition n'est plus la garantie de ce qui doit être fait, car ce qui est à venir – en raison du statut du risque dans une civilisation technologique – est indéterminé, installé dans une discontinuité d'avec ce qui précède. La tradition pensait la prévention de risques connus ; la société du risque la précaution à l'égard de risques inconnus. Une société réflexive est post-traditionnelle. Il lui appartient d'envisager et d'anticiper des scénarios lui permettant de préciser ce qu'elle cherche à faire être sur fond d'incertitude grandissante. Nous ne connaissons rien des conséquences qu'engage la généralisation de nos dispositifs techniques. C'est une société tout entière qui est engagée à faire collectivement des choix quant à son devenir. Il s'agit par conséquent d'y apprendre à mettre en place des réflexions, des institutions et des méthodes accompagnant des décisions collectives portant sur l'idée même du type d'homme et de monde humain qu'elle veut faire advenir, alors que, plus ou moins nostalgiquement, les réflexions sur la décision sont hantées, par le modèle du choix personnel. Pour cette société du risque, société industrielle ou postindustrielle au développement continu – avec le défaut parfois d'y confondre le plan descriptif de l'innovation et avec le plan normatif du progrès – le développement cherche à s'y piloter par une anticipation fortement rationalisée et

7 Beck (2001), *Préface*, p. 26.

instrumentée. L'anticipation s'y formalise par la planification, la prévision, la simulation et la prospection, développant une véritable culture de la prospective. Mais une question doit nous arrêter. Est-ce que le poids de la prospective planifiée ne tend pas à écraser la fonction exploratoire de l'anticipation dans la construction d'une perspective visée, désirée et désirable ? En effet, pour une société du risque, s'envisager dans l'avenir c'est se dévisager à partir de futurs possibles, au point de se laisser croire qu'il s'agit de s'installer dans de grandes structures au sein desquelles il n'y aurait, finalement, guère de choix. Nos sociétés éminemment réflexives ont appris à déployer l'extension de la rationalité mathématisante du monde des choses et de l'industrie vers celui du monde des hommes et de leurs activités, via la médiation des sciences sociales et économiques et les sciences de gestion. Dans cet esprit, instruit des analyses de Max Weber, Jürgen Habermas a pu parler de « colonisation administrative du monde vécu » ou de « bureaucratisation croissante du monde de la vie » à propos de cette civilisation de la planification.

Mais la « société du risque » pose que dans une civilisation technologique comme la nôtre, les effets à très long terme de nos actions (nanotechnologie, biotechnologie, activité nucléaire) ont une telle ampleur et un tel retentissement qu'il nous est impossible d'en déterminer sans risques irréversibles, les conséquences bénéfiques ou désastreuses. Aux risques connus qui appelaient hier une attitude de prévention s'adjoignent des risques inconnus appelant une attitude de précaution. Plus radicale, l'éthique du futur présente dans le principe de précaution, dans l'impératif de responsabilité (Jonas), de futurs possibles ou futuribles (Gaston Berger ou Bertrand de Jouvenel) croit qu'on peut éviter un avenir catastrophique en anticipant les effets de la catastrophe. Pour Günther Anders, c'est ce qui distingue le catastrophisme de l'apocalypse. Mais ce serait ne pas assez être porté par la hantise pratique qu'il nous faut sauver le monde de son autodestruction morale et physique parce que nous vivons à l'âge des « télémeurtres » si nous assumons avec Anders, qu'*Hiroshima est partout*⁸. Dans une société du risque, il est une évidence de base qu'agir, c'est « agir dans un monde incertain » exigeant une redéfinition de la compréhension de notre responsabilité et des modalités selon lesquelles une décision, individuelle et collective, devrait être prise. Mais la conscience

8 Refusant les catégories de possible et de libre-arbitre, Günther Anders écrivait dans *La menace nucléaire. Considérations radicales sur l'âge atomique* en 1981: *Même si elle n'a jamais lieu, la possibilité de notre destruction définitive constitue la destruction définitive de nos possibilités*. Cité par Dupuy (2008), p. 13.

du risque interroge la réplique éthique qu'on peut y apporter. Celle qui est aujourd'hui dominante relève d'une approche en termes de quantification et de calcul des risques. Le principe de précaution paraît être l'interprétation officielle de ce qu'est l'éthique de la responsabilité. Mais cette interprétation officielle entretient un rapport avec le futur qui doit être éthiquement discuté. N'y-a-t-il pas dans cette interprétation de la décision en termes de calculs de risques, une compréhension du futur selon laquelle au sein de ce dernier ne font que se prolonger des logiques ou des tendances déjà présentes ? Bref est-ce que le piège n'est pas en ces matières de croire que du futur, il n'y aurait rien à attendre en termes de surprises parce que nous serions dans une culture de l'emprise scientifique et technique qui imposerait aux individus et aux sociétés sa logique, comme un nouveau destin ? Est-ce que précisément une civilisation technologique, laquelle repose sur une économie qui permet le déploiement de techniques rendues possibles par les recherches scientifiques pour lesquelles tout serait déjà joué – finalement c'est aussi la thèse de Anders -, n'impose pas de repenser plus en profondeur les liens entre imagination éthique et anticipation, en complexifiant et en questionnant où sont les lieux de la décision, de la créativité pratique, de l'innovation institutionnelle dans nos sociétés techniciennes ?

Entre prévision et prospective, c'est un philosophe, Gaston Berger, qui a inventé le substantif *prospective* pour caractériser une attitude d'esprit singulière « qui permet de voir loin »⁹. Développée dès la fin des années 1960 la prospective, d'abord présentée par Berger comme une « technique rationnelle » œuvrant à rendre l'action efficace pour l'homme, deviendra vite un « instrument de gouvernementalité » voire un « instrument d'action publique » producteur de normes, métamorphosant la régulation politique de ce qui est « à venir ». Pour Gaston Berger, la prospective est le lieu du choix et non de l'entérinement des faits. La prospective ne consiste pas à voir dans l'avenir une réalité déjà existante mais dissimulée que des méthodes scientifiques appropriées permettraient de faire apparaître (la prévision et la planification) mais au contraire voit dans l'avenir le résultat délibéré (ou non) de nos actions, exigeant de réfléchir à chaque fois que des décisions sont à prendre. Mais alors l'anticipation prend-elle forme dans la perspective prospective dont la prévision/planification serait la caricature ? Ici demeure en suspens la question du rôle que peut jouer l'imagination, si on entend cette dernière comme une faculté du possible pratique.

9 Berger (1967).

Avec la planification (commissariat général au plan), prévision, prédiction, et plus généralement la futurologie, nos sociétés s'organisent et s'ordonnent et sont confrontées au sens qu'il conviendrait de donner à cet ordre. Elles font apparaître qu'il y a du structuré dans le temps à partir penser le monde commun comme stable, même à lui-même. Plans, scénarios, prévisions, simulations édifient un type de monde. Ils orientent notre monde commun vers un type de monde et de société mais laissent en suspens le fait de savoir s'il est souhaitable, voire désirable. Or comment résister au maintien du monde de l'action face à la domination du monde de l'œuvre ? Est-il possible de maintenir au sein de cette logique de la planification hostile à l'imprévisible qui fait pourtant un des traits de l'action (cf. Arendt) une logique de la création pratique qui ouvre des espaces de choix, d'orientation ? Si la liberté n'est pas à partir de rien mais en situation, la prospective doit-elle se comprendre comme la suppression du choix ou bien plutôt comme l'occasion du choix par l'anticipation en imagination et la multiplication des possibles au cœur de la contrainte instrumentée ? Alors que nous avons l'impression d'être dominés par un monde ultrarationalisé – du monde de la recherche à celui des entreprises qui parlent de leurs procédés dans le langage isonormé des procédures et normes dites précisément Iso - qui bride notre capacité d'initiative, il s'agit donc de penser l'initiative au cœur de l'organisation rationalisée. Nous avons à piloter sur le plan éthique et politique des dispositifs et l'organisation du monde commun ordonnés rationnellement. Ils ne sont pour nous un destin que dans la mesure où nous avons délaissé leur pilotage éthique et politique, alors qu'ils mobilisent nos capacités. *Il s'agit de restaurer et d'exprimer notre responsabilité au niveau même de la prospective, c'est-à-dire de l'insérer dans toutes les zones d'incertitude, dans les nœuds d'indécision où des choix de caractère éthique peuvent être incorporés à la décision collective. [...] Nous avons donc à ... découvrir les formes nouvelles du choix offertes par une société de la prévision et de la décision rationnelle, au lieu de penser avec nostalgie à ces formes anciennes de liberté*¹⁰.

Une compréhension renouvelée de ce qu'est la décision dans notre situation de crise et la fécondité d'une raison pratique enrichie du travail exploratoire de l'imagination se déploient donc sur plusieurs plans : a) sur le plan anthropologique, elles questionnent comment restaurer dans leurs capacités créatrices pratiques tous les acteurs scientifiques, techniciens ou ingénieurs qui deviennent les « fonctionnaires du développement » ; b) sur le plan

10 Ricœur (1955), p. 304.

éthique, elles ouvrent sur la nécessité de laisser résonner le retentissement moral de l'avenir anticipé en imagination non pas pour se plier à un nouveau destin mais pour étendre et redéfinir la sphère de la responsabilité (cf. Hans Jonas) ; c) enfin sur le plan juridique et politique il s'agit de travailler à repérer où sont les lieux de la décision, d'apprendre à collectivement les assumer dans des formes de décisions collectives et y répondre en travaillant à développer une forme de la « démocratie » sachant la crise écologique, la mobilité culturelle globale, le poids de l'expertise et les effets de la mondialisation de l'économie financière.

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THE INTERDISCIPLINARY CHALLENGE

INTERCULTURAL CATEGORIES OF THOUGHT IN TIMES OF CRISIS. THE CHALLENGE OF INTER/MULTI-DISCIPLINARY RESEARCH

Flavia Stara

Within the new multicultural socio-urban contexts, many are the questions about the dynamics of relationships among people, with emphasis on moral and pragmatic key issues referring to education, well-fare and legal regulations. The biggest challenge for contemporary democracies is to find morally acceptable and politically viable strategies for the sustainability of social interactions. At present in Europe the assumptions that guided politics for decades are queried by clashes on the rights of migrants and cultural minorities. On the global level, the foundations of the theory of human rights are shaking as they are more and more questioned by diverse cultural traditions. Principles, worldviews, moralities, languages claim their own space for truth, pointing to a contradiction between universalist and relativist tendencies. How is it possible to break the persisting deadlock of fear, anxiety and deep prejudices so as to engage in a pluralistic approach to human rights? How can human rights be turned into a value truly celebrated by all cultures if -more or less- they are only respected in western contexts?

When the appearance of “existential malaise” concerns no longer the individual, but the structures of social interaction with plural demands, it would not be fruitful to pursue schematic investigations and seek separate professional resolutions. Pluralism can flourish if the search for it is not based upon the claim of an absolute truth. Neither is it possible to separate the social from the epistemic dimensions of truth claims.

More than fifty years ago, a famous American judge, Billings Learned Hand, advocated the study of humanities for the future direction of law. Hand’s assumptions focused on three points: the first is that the study of law is either part of or is strongly connected to the humanities. The second point is that the lawyer or legal scholar who is called upon to analyze legal questions cannot do so by merely looking within the confines of traditional legal materials, since s/he needs assistance and edification from other sources. The third point is that the external sources of knowledge are to be found not only in the natural sciences or in the social sciences, but in subjects that are customarily called “the humanities.” The domain of legal analyses to some extent had to

be challenged. Never the less the sovereignty is still predominantly legalistic so far as the human rights are concerned. It may be argued that human rights are conceptually legal: to have a right is to have a legal claim, whether that claim is grounded in natural or positive law. Indeed, human rights are effective only if embodied in legal systems, but the important demands about the processing of rights need to be examined more extensively. Pluralism is a normatively underpinned social pattern according to which the diversity of interests, opinions, values, ideas of individuals and groups is recognized as a constitutive element of socio-political order.

Some of the European countries are more and more, facing the problem of dealing with alien migrant (legal and illegal) populations. There is an urgency to reach solutions that can be considered fair and fitted both for the hosting countries and the immigrants. In this direction human and social sciences have been elaborating for the last twenty years a critical approach to rethink the relations among historical, cultural and national identities. This humanistic counseling, defined as interculturality, hermeneutically deconstructs the fixity of the concept of diversity.¹ On the methodological level it puts in place an interaction among different contents, methods, forms of knowledge, which can favor inter and multi-disciplinary conjectures to guide praxis on the said issues of contemporary relevance. It stresses on the action-tool of dialogue (meeting, confrontation, articulation of logics; *dia-logoi*) and on the contribution of different standpoints (*topoi*) in the key areas of law, education, religion, economics for the construction of different discourses and practices of social cooperation. Such acknowledgement of diverse methodologies of analysis of conflicting interests in today's civil society, entails the recognition of an existential reality that cannot be exhausted by distinct paradigms of knowledge.

Despite the fact that intercultural research approach is shared by Human and Social Sciences, the same disciplines have not yet produced outcomes derived from an effective multidisciplinary collaboration. Therefore, since intercultural interpellation puts at stake, on a conceptual and practical ground, the pluralistic cohabitation within social contexts, it is particularly significant for the humanities to assess resolutions with legal knowledge. Interculturality by stressing the process of interaction among different cultures, tackles the discomfort that affects all complex societies, in which global economic par-

¹ For useful sources on interculturality, see: Wimmer (1990); Wimmer (2004); Mall (1995); Fornet-Betancourt (2000); Pinto Minerva (2002); Portes, Rumbaut (2001).

adigms apply to different ethnic roots which mingle and intertwine in large urban and metropolitan areas, as in local communities. Here conflicts may even become internal to a single cultural entity (because of contamination, hybridity, miscegenation), with clashes between immigrants of the first and second generations, leading to crucial consequences involving social service facilities (hospitals, courts, bureaucracy, etc.) as well as educational spaces. Therefore, in the setting of interculturality, a possible cooperation among Humanities, Social and Legal Sciences, should move from the level of *logos* toward the construction of *praxis*. It requires, indeed, an attitude of epistemological openness among theories and methods pointing out the importance of gaining insights and broadened perspectives on how problems, commonly concerning law, are conceptualized and solved by other disciplines ad vice versa, as well as by testing the dominant assumptions and resolutions of legal discipline with the consequences of other knowledge. The awareness to empower each individual with rights, implies searching, at all levels of competence, for an ethic of words, of rules, of social means so to unsettle a balance mainly forced by economic mechanisms. Thus to contribute to a space in which each individual, be s/he a citizen, be s/he merely the holder of an international human right, is represented, recognized and protected in his/her capacity to contribute his/her opinions and visions about common good.

Taking into account this crucial issue of migrants' adaptation to a basic west-centric understanding of the democratic ethos, our country- Italy- designed two systems for addressing this problem. One is the functional system that is based on social assistance resources and works to the satisfaction of basic needs and the legal integration of foreign populations through inclusionary policies. The other one is for social interaction which aims at a communicative system entrusted to the educational dimensions, to enable the society to overcome the asymmetry between who is receiving and who is harbored. However, these two policy directions have not yet reached an effective operational synergy.

The problem lies in the fact that the formal recognition of diversity and otherness is often associated with the preconception of superiority of the developed cultures and with consequent dynamics of incommensurability. It is equally true that, in many cases, these processes of fragmentation and emphasis of the differences are caused not only by aggressive processes of assimilation or segregation but also by defensive encapsulations of resistance implemented by the same minorities to protect their traditions.

It is against this background of fragmented social reality that one can appreciate the standpoints of three multi-disciplinary scholars on some significant social configurations in multicultural contexts, in reference to issues strictly connected with economic crisis and legal resolutions.

The first proposal comes from sociologist Nancy Fraser who discusses how the idea to remedy the unfair distribution of resources by using an economic-cultural recognition policy is rather illusory in multicultural societies². The second suggestion is from philosopher Harry Frankfurt who commenting on the concept of inequality, observes that presently the problem is not “inequality” as such, but that some people have not “enough”: so, egalitarianism is beside the point.³ Lastly, the considerations of the theorist and political activist Raul Fornèt Betancourt who points how the economic crisis could lead to a shared construction of a social and economic environment more favorable to develop a responsible and sustainable growth. The above mentioned perspectives, handled according to the intercultural paradigm, carry along interesting conceptual challenges for a multidisciplinary research approach.

Theorists of redistribution of wealth assess that injustice is primarily economic, therefore any remedy could be found only in the economic restructuring: since the affected communities are divided into classes the goal is to abolish the differences because they are unjust. For those who advocate politics of cultural recognition, the matter is the social injustice, so the remedy lies in a social reorganization: since the affected communities are divided into groups, the purpose is the abolition of differences between arbitrary hierarchies. The non-recognition, in fact, is not an obstacle on the path of self-realization, but an institutionalized subordination and thus a violation of justice, *id est*, a discrimination that society could not resolve and therefore institutionalized. In reference to this, Nancy Fraser suggests a two-dimensional idea of Justice: the core is the notion of parity of participation, which has an objective condition (fair economic distribution) and an intersubjective one (cultural recognition). One can better understand the position of Fraser if one appreciates her use of the terms “class” and “status” to indicate subordination, by matching the first term with mal-distribution and the second term with non-recognition. The status subordination: gender, ethnicity, sexual orientation is rooted in institutionalized patterns of cultural values. The class subordination is already in the structural features of the economic system: capitalism produces poor. But

² Fraser (2003).

³ Frankfurt (2015).

the fact that there is no pure society in economic or cultural sense leads Fraser to ask which characteristic has the priority. And Fraser is of the view that neither class subordination nor status subordination should be privileged, as they are not exclusive and “the status” involves a reference to the both. The issues must be addressed together trying to assess whether redistribution creates non-recognition and if recognition produces mal-distribution.

The admission of the plurality of truth claims -that is implied by Fraser position- is essential for a multicultural society as it creates space for framework of rights, obligations and responsibilities, and it also serves as an “institutionalized arena of discursive interaction”.⁴

The philosopher H.G. Frankfurt while recognizing that economic inequality is one of the most debated issues of our time, and although elimination of poverty is a desirable goal, says that the establishing economic equality is not in itself an important end. Indeed, according to the philosopher from Princeton, this can distract from the really important task, which is to ensure to everybody the basic measures and resources to live a dignified life. In this context, the elimination of inequalities ceases to be the primary focus of social policies, although it is true that those who have more resources enjoy significant competitive advantages over those who have less. However, the economic inequality is undesirable -as Frankfurt underlines-as it produces other kinds of unacceptable inequality, which undermine the role of trust in the institutional structures of a system of government. From an ethical point of view, it is not important that everyone has “the same” portion: it is important that everyone has “enough”, because if everyone had enough and was in a “condition of sufficiency” then we could have a comparatively sustainable socio-economic system. The theory of equality has spread and took deep root in the collective imagination, because dividing into “equal parts” is more associated with an application of justice than determining how much a person should have in order to have enough. Therefore, economic egalitarianism availed broader consensus toward the importance of investigating in depth the ethical issue of having enough: this made possible for economic theory of equality to become better articulated than sufficiency theory. Rather - as Frankfurt observes - it should be noted that the strength of egalitarianism is not original, but derived. The true essence of egalitarianism, as a matter of fact, emanates from the most basic requirements of respect and fairness. In a fundamental way what prescribes to guarantee the same rights to all human

4 Fraser (1990), pp. 56-80.

beings is the recognition of a moral duty to impartially respond to all humanity, not the supposed supreme importance of equality as a mandatory aim. Equality, consequently, is not in itself the main reference term to delineate a correct relationship among individuals and among them and the society in which they are members as citizens. The central value at the base of the inter-relationship should be the respect due to every individual of the whole of humanity. Respect, therefore, is the general principle of equality grounded on the moral premise of humanity, because every single being participates in a common nature. Respect for Frankfurt is the deductive criterion to trace all searches on moral basis. Therefore, the interdependence between respect and reason ought to constitute the orientation of political action for supporting intercultural societies, especially with regard to norms and the conceiving of norms as a practice to maintain human agency as a constitutive element of norms.

Coming to the third scholar namely Raul F. Betancourt, he notes that the “liberation” of the world from the centralism currently established by neo-liberal globalization implies the demand for the right of any culture to determine their own contexts - and specifically the economic ones - in light of their needs. His discourse insists that the cultural order does not dissociate from the economic sphere: indeed, every culture should be able to implement the economic system that is most appropriate to its particular situation. He is of the view that to “culturalize” the economy means allowing each country to identify its own development techniques, its resources and their management. Even money is a cultural factor and so the problem lies in the way it can be used in the market processes. According to Betancourt “culturalize” means “pluralize” the processes of money, and therefore the economic processes. So the pluralistic or intercultural approach expresses itself in a concrete de-location of the individual for a better social profit.⁵ It is defined as a politically and economically challenging space, through the multi-culturalization of resources, designing entrepreneurial strategies dictated by needs specifically detected to be privileged.

The connection between the cognitive and epistemological dimensions with the ethical dimension, in the particularity-universality ratio expressed by the intercultural perspective, can be seen in the fact that within the activated contribution of practices and knowledge (political philosophy, applied ethics, law, economics), the purpose is to enhance the appreciation of human

5 Fornet-Betancourt (2004).

values. The plausibility of an intercultural paradigm is directly linked to the criticism of uniforming theories and practices that, in the name of alleged artificial and exemplary universalism (Western democracy, the neoliberal market, globalization etc.) call into question the territorial specificities and the very sovereignty of cultures, engaged in a confrontation (and sometimes in a clash) with civilization models hegemonically set up in cultural spaces destined to marginalization and even to exclusion.

In the light of these considerations it appears realistic that the theoretical and epistemological intercultural instance connects with a model of political praxis for a radical social hermeneutics that challenges any subject specific paradigm of knowledge and competence. Hence a multidisciplinary approach is needed for a comparative investigation of the complex geo-political space of European citizenship in order to identify historical conditions, economic interests, legal resolutions and religious tensions. The awareness and knowledge acquired through this approach will facilitate to re-configure the reality of contemporary European scene and will lead to its critical appreciation, resulting in an appropriate pragmatic and epistemic action.

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AN INTERDISCIPLINARY APPROACH TO INTERNATIONAL LAW? SOME CURSORY REMARKS

Paolo Palchetti

1. In this brief work, I will attempt to answer to three main questions. They all focus on the role of interdisciplinarity for addressing international law problems. They can be formulated as follows: First, is there any need for interdisciplinarity in the study of international law? Second, what importance is currently attached to an interdisciplinary approach by international legal scholarship? Third and finally, what are the challenges posed by, and the risk inherent in, an interdisciplinary approach to the study of international law? As one can immediately realize, these are broad questions. I will limit myself to some introductory remarks. In doing so, I will also bring to the task my personal experience as a participant to the University of Macerata's research project on "Perceptions of (In)Security and Forms of Legal Protection in Times of Crisis".

2. Is there any need for interdisciplinarity in the study of international law? As one can easily understand, there is no straightforward answer to this question. It is not a matter of "yes or no". The answer depends on what one considers to be the proper object of study for international lawyers. To put it otherwise, it depends on what one considers to be the task of international legal science. If one adopts a strictly positivistic approach to international law (or to law in general), there seems to be little or no need for an interdisciplinary approach. In a Kelsenian perspective, only positive law is law and only positive law is the focus of the legal science. Law must be determined on the basis of its own formal criteria of validity,¹ without any need to refer to external values. It must therefore be kept separate from political, moral, economical, sociological, or any other non-legal considerations.² In this perspective,

1 On the relationship between formalism and positivism, see Bobbio (1979), pp.167-169.

2 For a clear exposition of this method, see the judgment of the International Court of Justice in the *South West Africa (Liberia v. South Africa)* and *(Ethiopia v. South Africa)* cases: "Throughout this case it has been suggested, directly or indirectly, that humanitarian considerations are sufficient in themselves to generate legal rights and obligations, and that the Court can and should proceed accordingly. The Court does not think so. It is a court of law, and can take account of moral principles only in so far as these are given a

lawyers do not need interdisciplinarity. Their role is simply to *describe* what the law is. As Lassa Oppenheim put it at the beginning of the XX century, “the first and chief task [of the science of international law] is the exposition of the existing rules of international law”.³ A different view is warranted if one includes among the tasks of the science of international law also a *prescriptive* dimension (“what the law should be”) as well as an *explanatory* dimension (“why the law prescribes a certain conduct” or “why rules are complied with or are broken”). If the focus is shifted from the rules, and the description of the rules, to the decision-making process, and the reasons behind that process, the importance that can be attached to an interdisciplinary approach changes considerably. As observed by François Ost and Michel van de Kerchove, any attempt to *explain* inevitably entails the taking into consideration of non-normative and extra-legal elements.⁴ If the task of the international legal science is that of identifying the reasons behind certain legal phenomena, it becomes necessary to look beyond the boundaries of the legal discipline.

3. This brings me to the second question, which concerns the current trends in international legal scholarship about the methods and tasks of international law in general, and about the importance attached to interdisciplinarity, in particular. There is little doubt that legal positivism was the leading school of thought in international legal scholarship for the great part of the twentieth century.⁵ The study of international law was dominated by a rule-oriented approach. Corollaries of such an approach were the importance assigned to formal sources in international legal discourse and the distinction between existing law and policy considerations. The dominance of a rule-oriented approach is probably the main reason why, for a long time, international law scholars paid little attention to the potentialities of interdisciplinarity for the study of international legal phenomena. It may be interesting to note that, in

sufficient expression in legal form. Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.” *ICJ Reports 1966*, at 34, para. 49.

3 Oppenheim (1908), pp. 313-356, (p. 314).

4 Ost, van de Kerchove (2002), p. 457 (“toute tentative d’explication intégrée nécessairement des données tant non normatives qu’extra-juridiques”). See also Corten (2009), pp. 62-63 (“à la différence de l’approche formaliste, l’approche critique comprendra toujours une part d’interdisciplinarité, dans la mesure où l’analyse du système juridique en tant que tel sera complétée par la mise en œuvre d’une perspective de type sociologique”).

5 On this, see the contributions in Kammerhofer, D’Aspremont (2014).

the period after the Second World War, little attention was also paid to other non-strictly legal aspects of the discipline, such as the theory of international law and the history of international law. Here again, it could be argued that the predominance of a positivistic conception of international law might have induced the perception that the focus of international legal research had to remain on concrete applications of the law, while theoretical research lied outside the scope of the discipline.⁶ The trend towards specialization may also partly explain this phenomenon: with the expansion of the domains of international law, international lawyers appear to have progressively focused on the analysis of positive law and of practical problems, while largely abandoning the theoretical reflection.⁷

4. It was only in the second half of the century, and most intensely in the last three decades, that legal positivism, with its rule-based conception of international law, has been seriously challenged by other theoretical approaches. International law is nowadays characterized by methodological pluralism. A recent publication of the *American Society of International Law* identified 8 different approaches: positivism, policy oriented jurisprudence (or New Haven approach), new international legal process, law and economics, critical approach, international law and international relations approach, feminist approach, and third world approach.⁸ All these new approaches depart from a normative conception of international law. Some of them – such as the policy oriented jurisprudence or the new international legal process – essentially focus on decision-making processes, aiming at examining the factors which influence decisions and at evaluating policy alternatives. They have their origin in American legal realism and attach importance on the effectiveness of legal rules. Thus, they stress the difference between “decision” and “law” on the assumption that the focus on existing rules “does not properly reflect the reality of how law is made, applied and changed”.⁹ The object of

6 See, with regard to French international law scholarship, Cot (2006), pp. 537-596, (p.539) (“La philosophie de droit a été laissée par les internationalistes aux philosophes. Le débat intellectuel se poursuit heureusement, mais dans un cadre bien précis”).

7 As regards to the importance attached by international law scholars to the history of international law after the Second World War, see Koskeniemi (2004), pp. 61-66, (p. 61) (“the increasing specialization of international law directed attention away from history and general reflection of the profession’s past”).

8 See Ratner, Slaughter (2006).

9 Wiessner, Willard (2006), pp. 47-77, (p. 52).

legal analysis becomes the determination of “how international legal rules are actually used by the makers of foreign policy”.¹⁰ Alongside these approaches that concentrate on the process of decision-making, other approaches place emphasis on what the law should be, rather than what the law is. Feminism, critical legal studies, international relations/international law, Third World approaches are “distinctive ways of thinking about what international law is and should be; they involve the formulation of a particular set of concerns and the analytic tools with which to explore them”.¹¹

5. These theoretical approaches bring with them new conceptions of the role and tasks of the international legal science. Under these approaches, the task is not limited to identifying and describing the law but includes examining the decision-making processes and formulating policy proposals. As a leading exponent of the international relations/international law approach put it, “my goals as a lawyer, scholar and teacher are...to better understand and communicate the functions, origins, and meanings of legal rules and institutions, and thereby to contribute, in even a small way, to improving global governance”.¹² From a law and economics perspective, the function is “to assist international lawyers in perhaps their most important creative role – the design and operation of international institutions that permit states to overcome transactions costs and strategic problems and this to cooperate to realize joint gains”.¹³ The task of the international scholar being not anymore that of simply identifying what the law is, the answers to international law problems are sought by looking also to other, non-legal disciplines. Indeed, a common feature of these new theoretical approaches is that they are based on a high degree of interdisciplinarity, going beyond the realm of law to include methodologies and concepts developed in other areas of social science and humanities, from political science to sociology, from international relations to economics till linguistic. Thus, it has been said that, thanks to these new approaches, international law has experienced a marked turn to interdisciplinary research.¹⁴

10 O’Connell (2006), pp. 79-107, (p. 79).

11 Anghie, Chimni, (2006), pp.185-210, (p. 185).

12 Abbott (2006), pp. 127-157, (p.131).

13 Dunoff, Trachtmann (2006), pp. 211- 238, (p. 213).

14 Dunoff (2013), pp. 309-337, (p. 309).

6. If the current international legal scholarship reveals the end of the dominance of classical legal positivism and the emergence of a variety of theoretical approaches, it must be acknowledged, however, that the influence of these new approaches has been felt most in the United States, where they were born. In continental Europe, a rule-based approach to international law is still largely dominant. In this respect, national (or regional) legal cultures still appear to influence the way in which the study of international law is approached. This is an aspect which is sometimes neglected but which instead plays a significant role. As Stolleis put it, “although international law develops in a context of international communication, it remains entangled in the texture of national interests and habits of minds”.¹⁵ Italian international law scholarship – just to make one example – has been rather impermeable to the turn to critical self-reflection on the discipline which has characterized international legal scholarship at the world-wide level. Little can be found in terms of methodological debates or focused discussions on the new intellectual trends. There is in fact a clear reluctance by Italian legal scholarship to abandon the terrain of the technical legal analysis for engaging in theoretical discussion on the methods and techniques of international law. This may also explain why Italian scholarship has so far shown little interests in engaging in interdisciplinary researches involving international law. To a different degree, a marked preference for a rule-based approach still characterizes international legal scholarship in several other European States. In sum, we assist nowadays to a geographical divide in international legal scholarship. At the risk of stereotyping the differences, we can say that while American doctrine appears to be characterized by a certain rule-skepticism, European doctrine still maintains a positive attitude towards rules.¹⁶ The importance attached to interdisciplinarity is also a component of this divide. While American scholarship tends to challenge disciplinary boundaries, European scholarship appears to regard this kind of approaches as going too far and as losing sight of the importance of a rigorous legal analysis.¹⁷

7. This brings me to the third and last question: what are the dangers and challenges posed by an interdisciplinary approach to the study of internation-

¹⁵ Stolleis (2004), pp. 265-267, (p. 265).

¹⁶ See Verdirame (2007), pp.553-580, (p. 565). See also Cot (2009) fn 8, Jouannet (2006), pp. 292-335.

¹⁷ Verdirame (2007) fn. 16, p. 554.

al law? This issue has been the object of a significant debate among international lawyers. Nobody doubts about the importance of certain forms of interdisciplinarity. Modern thinking about international law has been influenced by successive waves of critical reflections on the discipline which have shed light on its nature by shifting the angle of observation through the recourse to analytical tools borrowed from other disciplines. In this respect, the “linguistic turn”¹⁸ and the “historiographical turn”¹⁹ experienced by international law in the last decades are particularly notable. Positivism itself has evolved significantly over the time. Departing from certain tradition postulates, such as the idea of the neutrality and the objectivity of the law, modern positivism is characterized by a greater awareness of the indeterminacy of the law and an increasing attention towards the extra-legal context of the law. In a modern positivist approach, “the investigation of legal rules and institutions must not be carried out without a proper contextualization, both socio-politically and ideologically, in order to fully understand the dynamics which spurred their adoption or establishment”.²⁰ This approach inevitably encourages a certain degree of interdisciplinary study of international legal phenomena. Yet, while there is nowadays a greater attention and openness toward an interdisciplinary approach, several critical voices have been raised against the type of interdisciplinarity which is advocated by many of the new methodological approaches to international law. Several authors have warned against the risks of the international legal discourse being colonized by approaches which put emphasis on the role of power in international relations. By focusing on the effectiveness of the law (“how is law effectively applied”) to the detriment of the normative dimension (“what is the law and how should States accordingly behave”), these approaches give priority to political science methodologies over legal forms. For these reasons, the interdisciplinarity they advocate has also been labelled as a “destructive” one, since it would have the effect of destabilizing the main tenets of international law as a legal discipline.²¹ The most well-known reaction against the risks inherent in this form of interdisciplinarity is Koskeniemi’s defense of a “culture of formalism”, which appears as a call for the preservation of the autonomy of the legal discourse.²² It is not

18 See, in particular, Kennedy (1987) and Koskeniemi (2005).

19 Bandeira Galindo (2005), pp. 539–559.

20 Cassese (2011), p. 258.

21 See Sing (2013), pp. 236–261, (p. 247).

22 Koskeniemi (2002), pp. 502–509.

here the place for examining in details all these positions. Their main point is clear. It is one I entirely agree with. The fact is that, without denying the relevance of interdisciplinarity, this cannot be conducted at the expense of a proper legal analysis. The strict methodology of law-ascertaining and the conceptual construction of legal notions should always be respected.²³

8. By way of conclusions, let me move to the University of Macerata's research project. What are the lessons learned from this research project? One of the risks inherent in any interdisciplinary project is the colonization of one discipline at the expense of the other. This risk has been provocatively described by Jan Klabbers in the following terms: "interdisciplinary scholarship is always, and inevitably, about subjection. Interdisciplinary scholarship is, more often than not, about imposing the vocabulary, methods, theories and idiosyncrasies of discipline A on the work of discipline B".²⁴ There is more than a grain of truth in this statement. Whenever researchers drawn from different disciplines engage in a common research, the most basic difficulty is that of defining a common vocabulary and there is always the temptation for researchers coming from one discipline to impose their vocabulary and methodologies on the others.

9. Klabbers has also noted that one of the difficulties of interdisciplinary scholarship derives from the fact that, in most cases, one tends to have an oversimplified image of the other disciplines. As he put it, "all pictures of neighboring disciplines tend to be flat, one dimensional, monolithic: the lawyer aiming to cooperate with historians all too often assumes that history comes in only one version"²⁵, forgetting that historians have their own battles over methodologies, theories and so on. In other words, the risk inherent in any interdisciplinary research project is that of an international lawyer turning historian, or even legal historian, without being aware of the variety of methodologies and approaches for making historical research.

23 See Nolte (2007), pp. 657-674, (p. 673-674) ("Der Kernbereich der Völkerrechtswissenschaft ist immer noch die rechtsdogmatische Analyse. Nachbarwissenschaften und öffentliche Debatte sind zusätzliche Erkenntnisquellen, weitere Foren und diese dienen nicht zuletzt zur Sensibilisierung für Probleme und Entwicklungen").

24 Klabbers (2009), pp.119-125, (p. 120).

25 Klabbers (2009), p. 122.

10. Apart from these risks, it is important to bear in mind that there are different ways by which a dialogue across the disciplines may be put in place. The Macerata project has engaged in a “soft” form of interdisciplinarity, by pulling together scholars from different disciplines who have addressed the same problem from different perspectives. It might well be that this form of dialogue across the disciplines should be qualified as a “multidisciplinary” dialogue rather than an interdisciplinary one.²⁶ This form of cooperation certainly attenuates the risk of falling into the above mentioned traps, as the level of integration of the various disciplines in a common discourse is rather limited. Its significance, however, should not be underestimated. To engage in this dialogue requires from each participant to “translate” the language of his/her discipline in a language that can be accessible to all the other participants, an exercise that, as has been noted, allow to “go beyond self-referentialism to self-reflectivity”.²⁷ Most obviously, by being exposed to this dialogue, each participant has become aware of the different dimensions of the problems under discussion, thereby acquiring new inputs for the theoretical reflections within the boundaries of his/her own discipline. These, in my view, probably represent two of the most rewarding results of this kind of initiative.

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²⁶ On the difference see Ost and Kerchoue (2002), fn. 4, (p. 467).

²⁷ See Aalberts (2013), pp. 503-508, (p. 506).

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RIGHTS IN TIMES OF CRISIS:
AN INTERDISCIPLINARY ISSUE FOR LEGAL STUDIES

Massimo Meccarelli

The study of fundamental rights currently requires new analytical approaches. The time of crisis has in fact attributed novel aspects to the problem.

In the long history of rights¹ – since the conception and development of the idea of legal protection for the human being as an individual, linked to the exercise of individual freedom – this model of legal protection has been developed by widening the recipient base, by enriching the catalogue of rights enacted in statutory law and by creating progressively more efficacious legal mechanisms and devices, thus reinforcing their level of unavailability.

One might observe that there is a tension to the progressiveness inherent in the very concept of rights and therefore, today as in the past, despite the differences, the problem is essentially still the same: how to expand and strengthen these rights. A closer analysis of the impact of the crisis on the regimes of legal protection warns us, however, that we perhaps face a more complex problem: on the one hand, the trend of expansion of rights continues, but according to a dynamic of multiplication and fragmentation that compromises its effectiveness and changes its nature.² On the other hand, the crisis has reduced access to rights (especially the social ones, but not only those if, for example, as it seems to us, immigration is also part of the crisis scenario we are talking about) as well as reduced the scope of impact of the rights. At the same time, the complex institutional system, consolidated over time to implement fundamental safeguards through rights, is still in force.

The problem of rights in times of crisis appears, therefore, in a new light; legal science has to acquire different points of view to solve it. This implies getting to the heart of the problem and re-discussing some founding ideas³. It is also necessary to verify the methods and knowledge involved in producing a legal discourse on the effectiveness of legal protection.

In this complex task, which implies a methodological and epistemological review, interdisciplinary dialogue takes a prominent place. It is on this partic-

1 Costa (2008), (2014).

2 See Meccarelli, Palchetti, Sotis (2014), pp. 10-22.

3 See further part 3 of this essay.

ular aspect that this brief analysis will dwell. However, it is merely a tentative assessment of a problem that deserves deeper study.

In the following pages, in order to establish the importance of the interdisciplinary challenge in legal studies, I will seek to highlight the inadequacy, in the present historical phase, of the model of legal protection by rights protection. I will then consider some methodological implications of dialogue in legal sciences, and conclude by reflecting on the potential of knowledge shared between legal, human and social sciences.

1. The theoretical model of legal protection by rights protection and its inadequacy in times of crisis

If we aim to study the contents of legal protection in times of crises (what is protected or has to be protected), we will soon realize that, first, we have to deal with the problem of the way in which the legal protection is produced. The matter is *to think about the premises*, to consider the problems related to the processes of rights production and the structure of legal systems dedicated to rights protection, as well as the new questions that have arisen within new cultural contexts.

Providing individual rights is in fact just one of the ways in which legal protection has been produced⁴ over the centuries. It is the “modern” way to ensure legal protection.

It has specific features: Rights are fixed primarily in a general and abstract form (usually by their enactment in statutory laws) in order to make them stable in view of the changing nature of political, social and economic issues. This approach to legal protection aims to identify and formalize the rights of the individual and to generalize and unify the subjective condition, thereby hoping to establish (abstractly) a plenitude of legal protection.

Moreover, it should be underlined that individual rights are linked to the implementation of a principle, the principle of equality, which forms the immediate pre-legal basis for rights. The equality principle, in fact, promotes a project⁵ for social and political reality. That is why rights perform a *subsumptive capacity* with respect to the social facts. It is a capacity to reduce the multiplicity of protection claims within the pre-established legal protection spaces.

4 Costa (2014), pp. 27-80.

5 Fioravanti (2009), pp. 105-133.

Nevertheless, the present phase in Europe shows deviations from this theoretical model. The trends that we have mentioned above *undermine the subsumptive capacity of rights* and they somehow oppose the program of implementation of the equality principle.

This is why we need to understand *how* legal protection is improved in order to consider what is being protected (or should be protected) by the law; we need to *check the means* in order to deal with the contents.

Here, however, another problem emerges. The theoretical model of legal protection by rights protection is in crisis, but our analytical approach and our construction tools for the problem of legal protection are characterized by the assumption of that theoretical model. Therefore, we also have the problem of rethinking the methods and the basis of epistemic references for the legal sciences. At the same time, we have to consider the opportunity of an interdisciplinary approach. Without claiming to solve these great questions, we can try here to dwell briefly on the implications of this challenge.

2. A dialogue among the legal sciences

It is not an easy task to develop a true interaction of knowledge among legal disciplines. First, we have to consider that, historically, the legal sciences defined their specific identities through emancipation from the problem of the *cognitive diagnosis of the social*. This is also part of the sphere of “the premises of the problem”, which must be included in today’s legal discourse; but it is this very competence in understanding the social that has, over the past two centuries, been gradually expelled from the scope of juridical thought itself. The cognitive diagnosis of the social has been entrusted to other sciences, particularly the social and human ones and, above all, to the action of politics.

Legal sciences have taken shape relying on the aggregative force of dogmatics⁶. It has been a process of building a knowledge composed of concepts and categories, and hypostatizing the doctrinal configurations and therefore the normative forms of legal problems. The axiological foundation, such as the assumed social model, on which this path was built and which refers to the liberal values of the monistic State and of individual liberty, quickly became an implicit⁷ element that did not need verification.

6 Cappellini (2010), pp. 155-162 and pp. 239-248; Hespanha (2012), pp. 410-451, (2013), pp. 223ff; Rückert (1988), (2011); Vano (2000); Haferkamp (2004); Henkel (2004).

7 By contrast we can observe that throughout the history of this legal regime, legal

With this formalistic model, legal disciplines grew up by way of differentiation, specialization of methods, categories and themes, marking boundaries and separations. Achieving self-referentiality and obtaining thematic / methodological self-sufficiency have also been ways to affirm the *raison d'être* of being and the autonomy of each legal discipline.

To take interdisciplinary approach seriously in legal studies means, therefore, breaking through not just methodological but also epistemological barriers.

Moreover, we have to observe that the demand for an update of the methodological approach also concerns legal disciplines that, like legal history, have in recent decades abandoned the formalistic approach to legal studies, aiming to act as a critical form of knowledge, able to relativize dogmatic certainties and produce a knowledge capable of revealing, precisely by way of the legal-historical perspective, certain mythologies and criticalities in contemporary legal discourse.⁸ The present phase raises new questions also in legal history, pressing it to update its relationship with the present.⁹

When legal history started to implement a critical approach, its voice in the interdisciplinary debate on the present acquired an eminently deconstructive function. In the time of crisis, however, the search for new solutions for the changing framework invites legal history to participate with the other legal disciplines in a constructive task. It is not a matter of taking past models that may be useful to govern the present. This kind of constructive attitude – which in the past has been, in fact, quite congenial to legal dogmatics – is not appropriate¹⁰. It is much more about focusing, by way of the legal historical perspective, on the *situational value*, rather than on the *anticipatory value* of certain doctrines or legal solutions. The task is to make a *history of the orig-*

discourse on rights, in some cases, has become more sensitive to the social dimension; see for example Cazzetta (2007); Grossi (2000). However such a rapprochement, despite some innovative approaches, was mainly based on the assumption of the formalistic self-delimitation. The program for equality has been able to keep “within its own scope” the legal discourse concerned with the social; it has created the opportunity to consider the social, but always assuming that the problem of legal protection could be resolved only through a subsumptive dynamic.

8 See among others Grossi (2005), (2006) pp. 3-74; Caroni (2005); Hespanha (2012) pp. 13-83; Stolleis (2012); Fonseca (2009).

9 See for example Nuzzo (2013); Costa (2013); Meccarelli (2013), (2015) pp. 249-250; Duve (2016); Augusti (2017).

10 See Caroni (2005), pp. 43-71; Grossi (1996), (2006), pp. 55-73; Somma (2002).

inal limits of legal ideas and legal structures, rather than (as is more usual) a history of their emergence¹¹.

Coming back to our own problem: formalistic and dogmatic legal disciplines must give up their usual self-sufficiency and break the circle of self-referential closure; non-formalistic legal disciplines such as legal history have to consider their dialogic position by way of new reasons and aims. Moreover, we have to consider this interdisciplinary dialogue not as a mere space for exchanging information and different points of view: it should become a platform for creating inter-connections.

How do we improve such a change in legal discourse? I think that that we should avoid looking for new general theories. It would seem more productive to follow a pragmatic approach, addressing specific topics and aiming, with interdisciplinary dialogue, to obtain original solutions.

We can consider acting on four fronts in this regard. We can put the focus on thematic areas that, in order to be analysed, require the integration of knowledge in a communicative and epistemologically complex framework. We can address these issues considering the “how” before the “what” of the legal problem in order to open a gate to the “premises” of the problem. We have to question what function our own disciplinary knowledge may have in this context. Finally, we have to consider the limits of our own disciplinary standpoint and, at the same time, consider the reasons and possible outcomes of the incursions into other fields of legal knowledge.

This is not a matter of declaring the end of the different autonomous legal fields. On the contrary, the fact of rediscovering common fields of interaction could update the *raison d'être* of some disciplinary distinctions. Specialisms can survive and even become useful if they save and provide points of contact among different fields, making possible the sharing of ideas and research outcomes. The interdisciplinary challenge means acquiring a dialogical attitude among the diverse areas of legal knowledge.

11 As I have already tried to observe (Meccarelli (2015) pp. 249-250), legal historical studies should be capable of analysing the *constraints of the theoretical sustainability of concepts*, a perspective mindful of the assumptions underlying the conceptualisation of ideas and attentive to the historical and theoretical conditions that justify their performance. With such an approach, legal history will be able to interact on a constructive level, without sacrificing its specific perspective necessarily devoted to historicizing.

3. A dialogue with philosophy and social sciences

Our problem acquires a more complex profile if we consider the relationship between the legal sciences (in dialogue) and the human and social sciences. We can look here at some examples, regarding rights and legal protection, to highlight the reasons and the potential of such dialogue among apparently distant sciences.

A possible common area of interest, for legal, human and social studies, is the conceptualisation of *otherness*: In this regard, we, as jurists, can find some enriching hermeneutical categories in the philosophical, sociological and anthropological debate¹². Our conception of law links with the idea of an abstract individual as recipient of the law and with “equality” as the device for its concrete implementation. Moreover, we have to remember that this conception has its own debts to certain philosophical references¹³.

Another rights-related topic, which is important for legal studies and is also considered in human and social studies, is the conception of *human and social interactions*: I am thinking about the forms of sociality and the relational practices that make them possible. Philosophy and social sciences show many facets of the problem. Interculture, hospitality, fraternity and the analysis of identitarian social processes¹⁴ show possible dynamics of interaction that does not still have proper correspondence with legal institutions.

Furthermore, there is the fundamental issue of *social cohesion*: It is a matter of establishing a dialogue among these sciences in order to consider possible new configurations for the relationship between rights and social cohesion and more generally for the *practices of conviviality* as a field of occurrence of this relationship¹⁵. Fundamentally, the protection of rights arises precisely from a specific philosophical understanding of the problem of social cohesion, one that draws on the idea (in Hobbes and then in Rousseau) of a community of individuals who establish political authority with a monistic character and as a sovereign entity. A dialogue with philosophy and social sciences can encourage emancipation from such a modern configuration of the problem.

12 Among others Lévinas (1985); Todorov (1991); Habermas (2008); Waldenfels (2008); Sayad (2008); Viveiros De Castro (2015), (2011).

13 Hespanha (2012), pp. 307-358; Tarello (1976), pp. 133-190; Villey (2013), pp. 493ff.

14 See for example Stara (2014); Galli (1998), pp. 219-243; Derrida (2000); Mauro (2017); Baggio (2009); Latour (2005); Godicheau, Sánchez León (2015).

15 Sakrani (2016); Wimmer (2013); Vertovec (2009), (1999); Duve (2014); Mauro (2017).

A last field of possible interaction concerns conceptions of *normativity*. Philosophy and social sciences can consider levels of normativity that are before or outside the legal dimension, such as levels of social regulation, that nevertheless appear relevant to an understanding of the problem “rights in times of crisis”. I am thinking about the field of *disciplinary norms* and *biopolitic* that represent regulatory spaces, which have a strong impact on access to universal rights such as human rights¹⁶. I am also thinking about the problem of cultural diversity and pluralism¹⁷, embedded in the relationship between *law and ethics*¹⁸, which could allow an updated discussion on *multi-normativity* from a legal point of view¹⁹.

These are just a few examples. So far, I have talked about *why* interdisciplinary dialogue with human and social sciences should be appropriate, but I have not addressed the question of *how*.

This is a much more complex issue, considering the epistemological diversity between these disciplines in dialogue. To understand the how of such dialogue probably requires a distinct analysis for each area of knowledge. Without attempting to fully explore this wide theme, we can observe here that it seems to be proper a pragmatic approach to the problem and that it may be helpful to improve dialogue by studying thematic areas, such as rights in times of crises, the complexity of which is beyond the understanding of each single specialist knowledge.

With these brief remarks, we can conclude that interdisciplinary research should not be a process of convergence in which the diverse forms of disciplinary knowledge have to lose their specificity and autonomy. The common field of action produced by this kind of dialogue does not, after all, absorb the whole field of action of each discipline; it constitutes rather an *additional scope* beyond the respective sites of gravitation of each discipline.

The challenging aspect of interdisciplinary dialogue, therefore, appears to be on another level. We can say that this additional scope has an *added value*: It tends to offer each disciplinary knowledge valuable opportunities for extension of its own base of epistemic references. It is probably this very de-disciplining

16 Fonseca (2012), pp. 149-164.

17 De Sousa Santos (1997), pp. 11-32, (2003); Costa (2012), pp. 139-156; Mazzarese (2013); Neuenschwander Magalhães (2014).

18 Viola (1996), pp. 195-213, (2012), pp. 465-481.

19 For a perspective from legal history see Vec (2009), pp. 155-166; Duve (2016), pp. 12ff, «Rechtsgeschichte» (2017).

experience²⁰ that offers the *heuristic margin* that allows the legal, social and human sciences to produce new syntheses in the problematic, adscriptive time of the crisis. On this margin it is possible to advance with confidence.

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²⁰ Sbriccoli (2009), pp. 1122-1123; Meccarelli (2009), pp. 75-77; Augusti (2017), pp. 356-357.

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